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No. 1854

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE SNOW STORM MINING COMPANY (a Corporation), (Defendant), and W. A. NICHOLLS (Intervenor),

Appellants,

vs.

ANDREW JOHNSON (Complainant),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

Records of U. S. Circuit
Court of Appeals
617

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

Messrs. HAPPY, WINFREE & HINDMAN, 18 Wolverton Block, Spokane, Washington,
Attorneys for Appellants.

Messrs. VOORHEES & VOORHEES, Traders Block, Spokane, Washington,
Attorneys for Appellee.

In the Circuit Court of Appeals of the United States, for the Ninth Circuit.

SNOW STORM MINING COMPANY (a Corporation), and W. A. NICHOLLS, Intervenor,
Appellants,

vs.

ANDREW JOHNSON,
Appellee.

Stipulation [Extending Time to File Record and Rehearing].

It is hereby stipulated by and between the Snow Storm Mining Company, and W. A. Nicholls, Intervenor, appellants herein, and Andrew Johnson, appellee herein, that the time for filing the transcript of the record in this cause with the clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit, be, and the same is hereby extended until the 20th day of May, A. D. 1910, and that this

cause may be set for hearing at the next regular term of this court, at Seattle, Washington.

Dated this 29th day of April, A. D. 1910.

CYRUS HAPPY and
W. W. HINDMAN,

Attorneys for Snow Storm Mining Company, and W. A. Nicholls, Intervenor, Appellants.

REESE H. VOORHEES,

Attorneys for Andrew Johnson, Appellee.

[Endorsed]: 1854. In the Circuit Court of Appeals of the United States, for the Ninth Circuit. Snow Storm Mining Company and W. A. Nicholls, Intervenor, Appellants, vs. Andrew Johnson, Appellee. Stipulation. Filed May 6, 1910. F. D. Monckton, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States in and for the District of Idaho, Ninth Judicial Circuit.

Andrew Johnson, of the city of Colfax, State of Washington, and a citizen of the State of Washing-

ton, brings this, his bill, against Snow Storm Mining Company, of the city of Mullan, State of Idaho, a corporation organized and existing under and by virtue of the laws of the State of Idaho, a citizen of the State of Idaho, and an inhabitant of the District of Idaho.

And thereupon your orator complains and says:

I.

That your orator now is, and, at and during all the times herein mentioned, was, a citizen of the State of Washington, residing at the city of Colfax in said State.

II.

That the defendant corporation, Snow Storm Mining Company, at and during all the times herein mentioned, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and a citizen of said State and resident therein, with its principal place of business at the city of Mullan in said State.

III.

That, on and before the 28th day of November, 1904, your orator was, and ever since has been, and now is, the owner of fifteen hundred (1500) shares of the capital stock of the said defendant corporation, Snow Storm Mining Company.

IV.

That, on or about the 28th day of November, 1904, your orator held and owned a certificate, numbered 1062, signed by the president and secretary of the said defendant corporation, for fifteen hundred

(1500) shares of the capital stock of said defendant corporation, and issued, under the seal of the said defendant corporation, to your orator, which said fifteen hundred (1500) shares of said stock was, on said date, standing in the name of your orator upon the books of said defendant corporation.

V.

That, on or about the 28th day of November, 1904, the said certificate was destroyed by fire at the city of Colfax, State of Washington.

VI.

That, at and during all the times herein mentioned, the following by-laws of the said defendant corporation, was in full force and effect, to wit:

"ARTICLE VIII.

CERTIFICATES OF STOCK.

Section 1. The capital stock of this Company shall be represented by certificates signed by the President and Secretary under the seal of the Company.

Section 2. Transfers of stock shall only be made on the books of the Company by the Secretary of the Company, upon the surrender of the certificate of stock, and the payment of twenty-five cents which shall go to the Secretary, but no transfer of stock shall be made on the books of the Company until all indebtedness to the Corporation of the person in whose name the stock stands is paid.

Section 3. Any person claiming to have lost a certificate or certificates of stock, may have a new certificate issued to him, by producing satisfactory

evidence of having given notice of his loss for sixty days by publication in a newspaper, published in the English language in the city or town of his residence, or in not residing in a city or town in which a newspaper is published, then in a newspaper published in the county in which he resides, and also in the city or county in which he claims to have lost such certificate, and in the city of Mullan, county of Shoshone, State of Idaho, and shall also produce and file with the Secretary his affidavit, setting forth the facts and circumstances of his loss as near as may be, and shall execute a bond of indemnity to the Company in such sums as may be satisfactory to the Board of Directors."

VII.

That, prior to the commencement of this action, your orator caused to be published, for a period of sixty days, a notice of the said loss of the said certificate, in a newspaper, published in the English language, in the city of Mullan, county of Shoshone, State of Idaho, and in the city of Colfax, State of Washington, which said city of Colfax, at and during all the times herein mentioned, was, and now is, the place of residence of your orator, and that, prior to the commencement of this action, your orator produced and filed, with the secretary of the said defendant corporation, the affidavit of the publishers of each of said newspapers to the effect that said notice was published, as aforesaid, which affidavit was accompanied by a copy of the notice so published, and also produced and filed, with said

secretary, the affidavit of your orator setting forth the facts and circumstances of the destruction of said certificate, as aforesaid, and also demanded, in writing, of the said defendant corporation, that its board of directors prescribe the form of indemnity bond, and the amount thereof, which would be satisfactory to said board of directors, in order that your orator might execute the same pursuant to Section 3 of Article VIII aforesaid, to the end that a new certificate of stock might be issued to your orator in lieu of that destroyed by fire as aforesaid.

VIII.

That, prior to the commencement of this action, the said defendant corporation, acting by and through its board of directors, declined and refused, and still declines and refuses to prescribe the form of indemnity bond, and the amount thereof, for the purpose aforesaid, and declined and refused and still declines and refuses to issue, or cause to be issued, to your orator, a new certificate of said stock in lieu of the said certificate so destroyed by fire as aforesaid.

IX.

That, since the destruction of said certificate, as aforesaid, the said defendant corporation has paid, on said stock divers and sundry dividends, to some person or persons other than your orator, the amount of which dividends are, to your orator, unknown, and has failed and refused to pay such dividends, or any dividends, to your orator.

Forasmuch as your orator can have no adequate relief, except in this court, and to the end, therefore,

that the said defendant corporation may, if it can, show why your orator should not have the relief hereby prayed and a full disclosure and discovery of all the matters aforesaid make, and according to the best and utmost of its remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived; may it please your Honors to grant unto your orator a writ of Subpoena of the United States of America, directed to the said defendant corporation, Snow Storm Mining Company, commanding it on a day certain to appear and answer unto this Bill of Complaint; and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

And that the said defendant corporation may be decreed to make, and issue, to your orator, certificate or certificates for fifteen hundred (1500) shares of the capital stock of the said defendant corporation; that the said defendant corporation may be decreed to account for, and pay, unto your orator all the dividends that have accrued and become payable, upon the said fifteen hundred (1500) shares of stock, since the 28th day of November, 1904.

And that your orator may be decreed to have such other and further relief in the premises as is consistent with equity and good conscience.

ANDREW JOHNSON.

VOORHEES & VOORHEES,
Solicitors for Complainant.

State of Washington,
County of Spokane,—ss.

On this 5th day of August, 1907, before me, personally appeared Andrew Johnson, the above-named complainant, who made solemn oath that he had read the foregoing Bill of Complaint, subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true.

[Seal] C. S. VOORHEES,
Notary Public in and for the State of Washington,
Residing at Spokane, Wash.

[Endorsed]: Filed August 6, 1907. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the Circuit Court of the United States for the Northern Division of the District of Idaho.

No. 405—IN EQUITY.

ANDREW JOHNSON,
Complainant,
vs.
SNOW STORM MINING COMPANY (a Corporation),
Defendant.

Subpoena Ad Respondendum.

The President of the United States of America, To Snow Storm Mining Company, a Corporation, Greeting:

You and each of you are hereby commanded that you be and appear in said Circuit Court of the

United States, at the courtroom thereof, in Moscow, in said District, on the first Monday of September next, which will be the 2d day of September, 1907, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Andrew Johnson is complainant and you are defendant, and further to do and receive what our said Circuit Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the Marshal of said District, or your Deputy, to make due service of this our Writ of Subpoena and to have then and there the same.

Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the Seal of our said Circuit Court affixed at Moscow, in said District, this 6th day of August, in the year of our Lord One Thousand Nine Hundred and Seven and of the Independence of the United States the One Hundred and 131st.

A. L. RICHARDSON,
Clerk.
By M. W. Griffith,
Deputy Clerk.

VOORHEES & VOORHEES,
Attys. for Complainant,
Res. & P. O. Address, Spokane, Wash.

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The Defendant is to enter his appearance in the above-entitled suit in the office of the Clerk of said

Court on or before the day at which the above Writ is returnable; otherwise the Complainant's Bill therein may be taken pro confesso.

I hereby certify that I received the within Subpoena Ad Respondendum at Lewiston, Idaho, on August 11th, 1907, and that I served the same upon the Snow Storm Mining Company, a corporation, by handing to and leaving with John Mocine, Secretary of the Snow Storm Mining Company, a corporation, personally a copy of the within Subpoena Ad Respondendum at 3 M. E. of Mullan, Shoshone County, State of Idaho, on August 13, 1907.

R. ROUNDS,
U. S. Marshal,
By Louis D. Schattner,
Deputy.

Lewiston, Idaho, August 16, 1907.

[Endorsed]: No. 405. In the Circuit Court of the United States for the Northern Division of the District of Idaho. In Equity. Andrew Johnson vs. Snow Storm Mining Co., a Corporation. Subpoena Ad Respondendum. Returned and filed Aug. 19, 1907. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Northern District of Idaho, Northern Division.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY,

Defendant.

Petition for Intervention.

To the Honorable Judges of the Circuit Court of the United States, for the Northern District of Idaho, Northern Division:

The petition of W. A. Nicholls respectfully represents and shows:

1st. That heretofore, and on or about the 6th day of August, 1907, Andrew Johnson, the complainant in the above-entitled suit, exhibited and filed his bill of complaint in equity against the Snow Storm Mining Company, a corporation, being number —— of the files of this court, wherein and whereby it is specifically alleged that the complainant therein is the owner of fifteen hundred (1500) shares of the capital stock of the said Snow Storm Mining Company, the defendant corporation, and that the said plaintiff had lost his certificate, number 1062, for such 1500 shares of stock, by the destruction thereof by fire in November, 1904; that the plaintiff had taken all proper procedure as required by the by-laws of the said Snow Storm Mining Company to entitle him to the issuance of a new certificate of stock in the said Snow Storm Mining Company, in lieu of the one so lost to the said complainant; that the said corporation refused to issue said new certificate to the complainant; that said corporation has paid dividends on the said stock to some other person or persons to the complainant unknown, and has refused to pay such dividends to the complainant, and wherein and whereby it is prayed that the said cor-

poration may be decreed to issue a new certificate for the said 1500 shares of the capital stock of the said Snow Storm Mining Company to the complainant, and may be decreed to account for and pay to him all dividends that have accrued and become payable upon such 1500 shares of stock since the 28th day of November, 1904. (For full details and accuracy as to the allegations and prayer of the said bill of complaint, reference being hereby made to the said bill now on file in the office of said clerk.)

2d. That on or about December 19th, 1905, the complainant in the said suit, entered into a contract with your petitioner herein, whereby your complainant agreed with your petitioner to sell, and did sell to your petitioner, the 1500 shares of the capital stock of the Snow Storm Mining Company referred to in the said bill of complaint, at the agreed price of twenty-six and one-half cents (26½) per share; and further agreed with your petitioner that in view of the loss and destruction of the certificate for said 1500 shares of stock, as set out in the said bill of complaint, he, the said complainant, would do all things necessary to procure from the said Snow Storm Mining Company, a new certificate for said stock, and would deliver the same to your petitioner; and especially, that he would procure from the said Snow Storm Mining Company, a statement that it would so issue said new certificate for said 1500 shares of stock. That it was further agreed by and between the parties to said agreement, that the purchase price for the said 1500 shares of stock, amounting in all to the sum of Three Hundred ninety-seven

and 50/100 Dollars ($397.50) should be paid by your petitioner to the complainant herein, upon the procurement by the said complainant of the said statement from the said Snow Storm Mining Company, or upon the delivery of the said new certificate.

3d. That thereafter, the complainant herein, refused and failed to procure such statement from the said Snow Storm Mining Company, and refused to do those things necessary to procure said statement from the said Snow Storm Mining Company, or to procure the said new certificate, to wit: He refused to execute the indemnity bond prescribed by the by-laws of the said corporation for the issuance of new certificates in lieu of lost or destroyed certificates, and that your petitioner thereafter himself, gave to the Snow Storm Mining Company the indemnity required by the said company as security, and thereupon, on the 26th day of February, 1906, the said Snow Storm Mining Company issued to your petitioner a new certificate, being number 1705, for the said 1500 shares of stock referred to in the bill of complaint herein and thereupon and forthwith, your petitioner, waiving the default of the complainant above set forth, tendered to the complainant herein, the agreed price for the said stock, to wit: the sum of Three Hundred ninety-seven and 50/100 Dollars ($397.50), which the said complainant refused to accept, and that your petitioner thereafter, and upon the 1st day of March, 1906, again tendered the said amount to the complainant herein, who again refused to receive or accept the same, and that your petitioner ever since has kept the said tender good,

and has been able, ready and willing to pay to the said complainant, the said amount, and still is ready, able and willing to pay said amount and perform any and all conditions of said contract as are and were by him to be kept and performed, and hereby tenders and offers to perform all the conditions of said contract.

4th. And forasmuch as your petitioner by virtue of the above recited facts, is interested in, and has a claim upon the subject matter of the said suit, and has a claim upon and a right to the property sought to be recovered by the complainant in said suit, and a manifest equity in the premises, and can have no adequate protection except in this court and in this suit.

Therefore, your petitioner prays that he may have leave of court to file this, his intervention petition, and that he may be permitted to intervene in said suit as a party defendant, and may thereupon move, demur, plead or answer and resist the said bill of complaint as fully and freely as though he had been made a party defendant in the said suit originally, and for such other and further relief as may be fitting in the premises, and your petitioner will ever pray.

HAPPY & HINDMAN,
Solicitors for Petitioner, W. A. Nicholls.

[Endorsed]: No. 405. In the Circuit Court of the United States for the Northern District of Idaho, Northern Division. Andrew Johnson, Complainant, vs. Snow Storm Mining Co., Defendant. Service of the Within Petition for Intervention is hereby ac-

knowledged this 20th day of Dec. 1907, in the County of Spokane, Washington. Voorhees & Voorhees, Attorneys for Plaintiff. Filed December 26, 1907. A. L. Richardson, Clerk. By M. W. Griffith, Deputy. Happy & Hindman, 18 Wolverton Block, Spokane, Washington, Attorneys for Petitioner W. A. Nicholls.

In the Circuit Court of the United States for the Northern District of Idaho, Northern Division.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant.

Order [Allowing W. A. Nicholls to Intervene].

Now at this time this cause coming on to be heard upon the motion of W. A. Nicholls to be permitted to intervene and file an answer in the above-entitled cause, and after reading the petition of the said W. A. Nicholls, and the Court being fully advised in the premises, it is hereby,

ORDERED, ADJUDGED and DECREED that the said W. A. Nicholls be, and he is, hereby permitted and allowed to intervene in the above-entitled cause, and file such pleadings as he may see fit to the complaint of the complainant herein.

Dated this 23d day of December, 1907.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed December 23, 1907. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant.

Answer of Intervenor W. A. Nicholls.

To the Honorable, the Judges of the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit:

W. A. Nicholls, of the city and county of Spokane, State of Washington, files this, his answer to the bill of complaint of Andrew Johnson. Thereupon your intervenor says:

1st. That heretofore, on or about the 6th day of August, 1907, Andrew Johnson, the complainant in the above-entitled suit, exhibited and filed his bill of complaint in equity against the Snow Storm Mining Company, a corporation, being number 405 of the files of this court; wherein and whereby it is specifically alleged that the complainant therein is the owner of fifteen hundred (1500) shares of the capi-

tal stock of the said Snow Storm Mining Company, the defendant corporation, and that said complainant had lost his certificate No. 1062, for said 1500 shares of stock, by the destruction thereof by fire in November, 1904; that the said complainant had taken all proper procedure as required by the by-laws of the said Snow Storm Mining Company, to entitle him to the issuance of a new certificate of stock in the said Snow Storm Mining Company in lieu of the one lost to the said complainant; that said corporation refused to issue said new certificate of stock to said complainant; that said corporation had paid dividends on the said stock to some other person or persons to the complainant unknown, and had refused to pay such dividends to the complainant; and wherein and whereby it is prayed that the said corporation may be decreed to issue a new certificate for the said 1500 shares of the said capital stock of the Snow Storm Mining Company, to the complainant, and may be decreed to pay all dividends that may have accrued and become payable upon said 1500 shares of stock since the 28th day of November, 1904. (For full details and correction as to the prayer and said bill of complaint, reference being hereby made to the said bill now on file in the office of the clerk of this court.)

2d. And whereupon the said intervenor herein, W. A. Nicholls, by an order of this court duly made and entered on the 23d day of December, 1907, and before the filing of this pleading, was permitted and allowed to become a party defendant to this action,

to intervene herein, and plead to the bill of complaint of the complainant herein.

This intervenor and defendant, saving and reserving unto himself the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as he is advised is necessary or material for him to answer unto, does aver and say that,

1. He admits the allegations in *paragraphs and* 2 of complainant's bill of complaint.

2. As to paragraph 3, this intervenor and defendant admits that on and before the 28th day of November, 1904, said complainant was the owner of fifteen hundred (1500) shares of the capital stock of said defendant corporation, Snow Storm Mining Company, but denies each and every other allegation in said paragraph contained.

3. As to paragraph 4, he admits the same.

4. As to paragraph 5, he has not sufficient information to form a belief, and therefore denies the same and each and every allegation contained therein.

5. As to paragraph 6, he has not sufficient information to form a belief, and therefore denies the same and each and every allegation therein contained.

6. As to paragraph 7, he has not sufficient knowledge to form a belief, and therefore denies the same and each and every allegation therein contained.

7. As to paragraph 8, he has not sufficient knowledge to form a belief, and therefore denies

the same, and each and every allegation therein contained.

And having thus fully made answer to said bill, this defendant and interpleader prays that he may be decreed the relief asked for and prayed in his cross-bill of complaint filed herein, and such other and further relief as may seem equitable and meet in the premises.

HAPPY & HINDMAN,

Attorneys for Intervenor and Defendant, W. A. Nicholls.

State of Washington,
County of Spokane,—ss.

Mary E. Cowan, being first duly sworn, says that she is a citizen of the State of Washington, over the age of 21 years, not a party to this proceeding, and competent to be a witness in such proceeding; that on the 27th day of December, 1907, she served a copy of the within and foregoing answer of Intervenor W. A. Nicholls upon Messrs. Voorhees and Voorhees, attorneys for Andrew Johnson, complainant herein, in the city of Spokane, county of Spokane, State of Washington, by then and there leaving a copy of said answer of Intervenor at the office of said Voorhees and Voorhees, by then and there delivering a copy thereof to Charles Voorhees, one of the firm of Voorhees and Voorhees.

MARY E. COWAN.

Subscribed and sworn to before me this 30th day of December, 1907.

W. W. HINDMAN,

Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed December 31, 1907. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Cross-bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, in and for the District of Idaho, Ninth Judicial Circuit:

W. A. Nicholls, a resident and citizen of the State of Washington, having filed his answer to the bill of complaint in this action, brings this, his cross-bill of complaint against Andrew Johnson, and whereupon your orator complains, alleges and says:

1st. That heretofore, on or about the 6th day of August, 1907, Andrew Johnson, the complainant in the above-entitled suit, exhibited and filed his bill of complaint in equity against the Snow Storm Mining Company, a corporation, being number 405 of the files of this court, wherein and whereby it is

specifically alleged that the complainant therein is the owner of fifteen hundred (1500) shares of the capital stock of the said Snow Storm Mining Company, the defendant corporation, and that said complainant had lost his certificate No. 1062, for said 1500 shares of stock, by the destruction thereof by fire in November, 1904; that the said complainant had taken all proper procedure as required by the by-laws of the said Snow Storm Mining Company, to entitle him to the issuance of a new certificate of stock in the said Snow Storm Mining Company in lieu of the one lost to the said complainant; that said corporation refused to issue said new certificate of stock to said complainant; that said corporation had paid dividends on the said stock to some other person or persons to the complainant unknown, and had refused to pay such dividends to the complainant; and wherein and whereby it is prayed that the said corporation may be decreed to issue a new certificate for the said 1500 shares of the said capital stock of the Snow Storm Mining Company, to the complainant, and may be decreed to pay all dividends that may have accrued and become payable upon said 1500 shares of stock since the 28th day of November, 1904. (For full details and correction as to the prayer and said bill of complaint, reference being hereby made to the said bill now on file in the office of the clerk of this court.)

Thereupon your orator further complaining states:

2d. That on or about the 19th day of December, 1906, the said Andrew Johnson entered into a con-

tract with your orator herein, whereby the said Andrew Johnson agreed with your orator to sell and did sell, to your orator, the 1500 shares of the capital stock of the Snow Storm Mining Company referred to in the said bill of complaint, at the agreed price of twenty-six and one-half (26½) cents per share, and further agreed with your orator that in view of the lost and destroyed certificate of said 1500 shares of stock, as set out in said bill of complaint, he, the said Andrew Johnson, would do all things necessary to procure from the said Snow Storm Mining Company a new certificate for said stock, and would deliver the same to your orator, and especially that he would procure from the said Snow Storm Mining Company a statement that it would so issue the said certificate for the said 1500 shares of stock. And that it was further agreed by and between the said parties to said agreement, the purchase price of the said 1500 shares of stock, amounting in all to the sum of three hundred and ninety-seven and 50/100 Dollars ($397.50), should be paid by your orator to the said Andrew Johnson, upon the procurement by the said Andrew Johnson of the said statement from the said Snow Storm Mining Company, or upon the delivery of said new certificate.

3d. And your orator further alleges that thereafter, the said Andrew Johnson refused and failed to procure said statement from the said Snow Storm Mining Company and refused to do those things necessary to procure said statement from the said Snow Storm Mining Company, or to procure the said certificate, to wit: He refused to execute the indem-

nity bond prescribed by the by-laws of the said corporation for the issuance of a new certificate in lieu of lost or destroyed certificates, and that your orator thereafter, himself, gave to the Snow Storm Mining Company the indemnity required by said company as security, and thereupon, and on the 26th day of February, 1906, the said Snow Storm Mining Company issued to your orator a new certificate being No. 1705, for the said 1500 shares referred to in the bill of complaint herein, and thereupon, and forthwith, your orator waived the default of the said Andrew Johnson above set forth, and tendered to him the agreed price for said stock, to wit, the sum of $397.50, which the said Andrew Johnson refused to accept. And your orator thereafter, and upon the 1st day of March, 1906, again tendered the said amount to the said Andrew Johnson, who again refused to receive or accept the same.

4th. And your orator further alleges that he is now, and at all times has been, ready, able and willing to comply with all the terms and conditions of his said contract, and has at all times been, and is now, able and willing to pay the said amount and to do any and all things necessary and proper which were by him to be kept and performed, and hereby tenders and offers to perform all the conditions of said contract; but the said Andrew Johnson at all times in this complaint mentioned has refused, and still refuses to accept said money or to perform any of the conditions of said contract.

5th. And your orator further alleges that the value of said stock at the present time has no regu-

lar market price; that it fluctuates in value daily, and that the value of the stock of said company now or in the future, cannot be easily estimated, and no damages awarded to your orator at the present value of said stock would compensate him for the loss of same; and that your orator has no plain, speedy or adequate remedy at law.

Inasmuch therefore, as your orator is without adequate remedy at law in the premises, he prays that he be adjudged the owner of the stock set out and mentioned in his cross-complaint, or if this relief cannot be granted, then that the said Andrew Johnson be compelled to specifically convey said property to your orator upon the payment by your orator of the contract price therefor, at such time and in the manner that may be prescribed by the order of this court.

And your orator further prays that your Honor may grant unto your orator a subpoena of the United States of America, to be issued under the seal of this court, directed to the said Andrew Johnson, commanding that he, on a day certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath, such answer under oath being hereby expressly waived, and to stand, perform and abide by such order, direction and decree as may be made against him, and your orator may have such other and further relief as in such equity may appear meet in the premises.

W. A. NICHOLLS.

HAPPY & HINDMAN,

Solicitors for Defendant and Intervenor.

State of Washington,
County of Spokane,—ss.

Mary E. Cowan, being first duly sworn, says that she is a citizen of the State of Washington, over the age of 21 years, not a party of this proceeding, and competent to be a witness in such proceeding; that on the 27th day of December, 1907, she served a copy of the within and foregoing cross-complaint upon Messrs. Voorhees and Voorhees, attorneys for Andrew Johnson, complainant herein, in the city of Spokane, county of Spokane, State of Washington, by then and there leaving a copy of said cross-complaint at the office of said Voorhees and Voorhees, by then and there delivering a copy thereof to Charles Voorhees, one of the firm of Voorhees and Voorhees.

MARY E. COWAN.

Subscribed and sworn to before me this 30th day of December, 1907.

W. W. HINDMAN,
Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed December 31st, 1907. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

W. A. NICHOLLS,

Intervenor and Defendant.

Answer of Snow Storm Mining Company.

The answer of Snow Storm Mining Company, a corporation, defendant, to the bill of complaint of complainant, saving and reserving unto itself the benefit of all exceptions to the errors and imperfections in said bill contained, for answer to so much thereof as it is advised is necessary and material for it to answer unto, does aver and say:

1. That as to paragraphs 1 and 3, defendant admits the same.

2. As to paragraph 3, this defendant has not sufficient knowledge to form a belief, and therefore denies the same and each and every allegation therein contained.

3. As to paragraph 4, this defendant admits that on the 28th day of November, 1904, there stood in the name of the complainant herein, upon the books of the defendant corporation, fifteen hundred (1500)

shares of stock, and the certificate therefor was No. 1062; but this defendant has not sufficient knowledge to form a belief as to the balance of said paragraph, and therefore denies the same and each and every allegation therein contained.

4. As to paragraph 5, this defendant has not sufficient information to form a belief, and therefore denies the same and each and every allegation therein contained.

5. As to paragraph 6, this defendant has not sufficient knowledge to form a belief, and therefore denies the same.

6. As to paragraph 7, this defendant admits that prior to the commencement of this action, the complainant secured and filed with the secretary of said defendant corporation, an affidavit of the publisher of said newspaper, to the effect that said notice was published as aforesaid, which affidavit was accompanied by a copy of the notice so published and the affidavit of the complainant, but as to the balance of said paragraph, this defendant has not sufficient knowledge to form a belief and therefore denies the same.

7. As to paragraph 8, this defendant admits that it declines and refuses and still declines and refuses to cause to be issued to this complainant a new certificate of stock, and denies each and every other allegation in said paragraph contained.

And having thus fully made answer to said bill, this defendant prays to be hence dismissed with costs.

HAPPY & HINDMAN,
Solicitors for Defendant Corporation.

State of Washington,
County of Spokane,—ss.

Mary E. Cowan, being first duly sworn, says that she is a citizen of the State of Washington, over the age of 21 years, not a party to this proceeding, and competent to be a witness in such proceeding; that on the 27th day of December, 1907, she served a copy of the within and foregoing answer of the Snow Storm Mining Co. upon Messrs. Voorhees and Voorhees, attorneys for Andrew Johnson, complainant herein, in the city of Spokane, county of Spokane, State of Washington, by then and there leaving a copy of said answer of Snow Storm Mining Co. at the office of said Voorhees and Voorhees by then and there delivering a copy thereof to Charles Voorhees, one of the firm of Voorhees and Voorhees.

MARY E. COWAN.

Subscribed and sworn to before me this 30th day of December, 1907.

W. W. HINDMAN,
Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed December 31, 1907. A. L. Richardson, Clerk. W. W. Griffith, Deputy.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant.

Notice of Motion [to Vacate Order Granting Leave to Intervene].

Take notice, that this Honorable Court will be moved, for and on behalf of the Complainant, on the 11th day of May next, that the order granting leave to intervene dated and filed herein on the 23d day of December, 1907, be vacated.

Dated this 29th day of April, 1908.

VOORHEES & VOORHEES,
Solicitors for Complainant.

To Messrs. HAPPY & HINDMAN,
Solicitors for Defendant and Intervenor.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

Motion to Vacate Order Granting Leave to Intervene.

Comes now the complainant above named and moves the Court to vacate the order of intervention dated and filed herein on the 23d day of December, 1907, which order permitted and allowed one W. A. Nicholls therein named to intervene herein, upon the ground that the contract alleged in the petition of said intervenor gives him no right to intervene in this suit in that it does not appear by said petition that said intervenor and petitioner has not a plain, speedy and adequate remedy at law for the alleged breach of said alleged contract.

VOORHEES & VOORHEES,
Solicitors for Complainant.

Due service of the within Notice of Motion and Motion by a true copy thereof, is hereby accepted, at Spokane, Wash., this 30 day of April, 1908.

HAPPY & HINDMAN,
Solicitors for Defendant and Intervenor.

[Endorsed]: Filed May 9th, 1908. A. L. Richardson, Clerk. W. W. Griffith, Deputy.

Order Denying Motion to Vacate Order of Intervention.

At a stated term of the Circuit Court of the United States for the District of Idaho, held at Moscow, Idaho, on Thursday, the 21st day of May, 1908, Present: Hon. FRANK S. DIETRICH, Judge.

No. 405.

ANDREW JOHNSON

vs.

SNOW STORM MINING COMPANY.

On this day this cause came on to be heard upon the plaintiff's motion to vacate the order of intervention heretofore entered allowing W. A. Nicholls to intervene in this cause.

Messrs. Voorhees & Voorhees and Thomas C. Dutro, Esq., appearing as counsel for complainant and Messrs. Happy & Hindman on behalf of the defendant and the intervenor and after argument by Thomas C. Dutro, Esq., for said motion and W. W. Happy, Esq., against the same, and upon consideration, the Court ordered that said motion to vacate the order of intervention heretofore entered allowing W. A. Nicholls to intervene herein be and the same is hereby denied and the plaintiff is given thirty days from this date to plead to the cross-complaint and Answer of the Intervenor W. A. Nicholls each on December 31st, 1907.

To the ruling of the Court in denying said motion to vacate said order allowing the said Intervention of W. A. Nicholls the attorneys for complainant then and there excepted in due form of law, which exception was allowed.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Replication to Answer.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Idaho:

The replication of the above-named complainant to the answer of the above-named defendant, Snow Storm Mining Company, a corporation.

This replicant, Andrew Johnson, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Snow Storm Mining Company, a corporation, for replication thereunto

saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

VOORHEES & VOORHEES,
Solicitors for Complainant.

[Endorsed]: Filed June 18th, 1908. A. L. Richardson Clerk.

Due service of the within replication by a true copy thereof, is hereby accepted, at Spokane, Washington, this 17th day of June, 1908.

HAPPY & HINDMAN,
Solicitors for Defendant, Snow Storm Mining Company, a Corporation.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Notice of Trial of Issue of Law.

Take notice, that the issues of law raised by complainant's demurrer to Cross-bill of Complaint will be brought on for hearing before this Honorable Court, at Boise, Idaho, on the 31st day of July, 1908, or as soon thereafter as the same can be heard by the Court.

Dated this 17th day of June, 1908.

VOORHEES & VOORHEES,

Solicitors for Complainant.

To Messrs. HAPPY & HINDMAN,

Solicitors for Defendant and Intervenor.

[Endorsed]: Filed June 18th, 1908. A. L. Richardson, Clerk.

Due service of the within Notice of Trial of issue of law by a true copy thereof, is hereby accepted, at Spokane, Washington, this 17 day of June, 1908.

HAPPY & HINDMAN,

Solicitors for Defendant and Intervenor.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Answer to Cross-bill of Complaint.

The answer of the above-named complainant, Andrew Johnson, to the cross-bill of complaint of the above-named defendant and intervenor, W. A. Nicholls.

The complainant, now and at all times hereafter saving to himself all and all manner of benefit and advantage of exception or otherwise that can or may be had or taken to the many errors, insufficiencies, uncertainties and imperfections in the said cross-bill of complaint contained, for answer thereunto, or unto so much, and such parts thereof, as this complainant is advised it is material or necessary for him to make answer unto, answering says:

This complainant denies making the contract with the intervenor, alleged in the cross-bill of complaint, without that, that any other matter or thing mater-

ial or necessary for this complainant to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed, or avoided, traversed, or denied, is true to the knowledge or belief of this complainant. All which matters and things this complainant is ready to aver, maintain, and prove, as this Honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

VOORHEES & VOORHEES,
Solicitors for Complainant.

[Endorsed]: Filed August 5th, 1908. A. L. Richardson, Clerk.

Due service of the within Answer to Cross-bill for Complaint, by a true copy thereof, is hereby accepted, at Spokane, Washington, this 3 day of August, 1908.

HAPPY & HINDMAN,
Solicitors for Intervenor W. A. Nicholls.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Replication to Answer [of W. A. Nicholls].

To the Honorable, the Judge of the Circuit Court of the United States for the District of Idaho:

The replication of the above-named complainant to the answer of the above-named defendant and intervenor, W. A. Nicholls;

This replicant, Andrew Johnson, saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant and intervenor, W. A. Nicholls, for replication thereunto saith and he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendant and intervenor, and that the answer of the said defendant and intervenor is very uncertain, evasive, and insufficient in law to be replied unto by this replicant; without that, that

any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct and humbly prays as in and by his said bill he hath already prayed.

VOORHEES & VOORHEES,
Solicitors for Complainant.

[Endorsed]: Filed August 5th, 1908. A. L. Richardson, Clerk.

Due service of the within Replication to Answer of W. A. Nicholls by a true copy thereof, is hereby accepted, at Spokane, Washington, this 3 day of August, 1908.

HAPPY & HINDMAN,
Solicitors for Intervenor W. A. Nicholls.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,
Complainant,
vs.
SNOW STORM MINING COMPANY (a Corporation),
Defendant,
and
W. A. NICHOLLS,
Defendant and Intervenor.

Replication [of W. A. Nicholls] to Answer.

To the Honorable, the Judge of the Circuit Court of the United States for the District of Idaho:

The replication of the above-named defendant and intervenor, W. A. Nicholls, to the answer of the above-named complainant, Andrew Johnson;

This replicant, W. A. Nicholls, saving and reserving to himself all and all manner of advantages to exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the complainant, Andrew Johnson, to the cross-complaint of this defendant and intervenor, W. A. Nicholls, for replication thereto sayeth that he doth and will aver, maintain, and prove his said cross-bill of complaint to be true, certain and sufficient in law to be answered unto by the said complainant, and that the answer of the said complainant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in said answer contained material or effectual in law to be replied unto, confessed, or avoided, traversed, or denied, is true; all of which matters and things this replicant is ready to aver, maintain, and prove as this Honorable Court shall direct, and prays as in his cross-bill of complaint he hath already prayed.

HAPPY & HINDMAN,

Solicitors for Cross-complainant, W. A. Nicholls.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

State of Washington,
County of Spokane,—ss.

Mary E. Cowan, being first duly sworn, says that she is a citizen of the State of Washington, over the age of 21 years, not a party of this proceeding, and competent to be a witness in such proceeding; that on the 4th day of September, 1908, she served a copy of replication of the above-named defendant and intervenor, W. A. Nicholls, to the answer of the above-named complainant, Andrew Johnson, upon Messrs. Voorhees & Voorhees, attorneys for the above-named complainant, Andrew Johnson, in the City of Spokane, State of Washington, by then and there leaving said copy of said replication to answer at the office of said Voorhees & Voorhees, by then and there delivering said copy to Charles Voorhees, one of the firm of Voorhees & Voorhees.

MARY E. COWAN.

Subscribed and sworn to before me this 4th day of Sept., 1908.

W. W. HINDMAN,
Notary Public for the State of Washington, Residing at Spokane, Washington.

[Endorsed]: Filed Sept. 12, 1908. A. L. Richardson, Clerk. W. W. Griffith, Deputy.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,
Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),
Defendant,

W. A. NICHOLLS,
Defendant and Intervenor.

Stipulation as to Facts.

It is hereby stipulated and agreed, by and between Voorhees & Voorhees, solicitors for the complainant above named, and Happy & Hindman, solicitors for the defendant, above named, Snow Storm Mining Company, and for the intervenor, above named, W. A. Nicholls, that, upon the trial of the above-entitled cause, the matters and facts hereinafter set forth, all of which said matters and facts are, for the purpose of the trial of said cause, hereby

admitted to be true and correct, shall be read in evidence and considered by the Court, if the Court shall overrule the objections thereto hereinafter provided for, and that the said Court shall render judgment upon said matters and facts together with such other matters and facts as may, upon such trial, be orally offered in evidence under the stipulation hereinafter set forth.

But it is further stipulated and agreed, and shall be so considered by the Court, that, while the parties hereto admit all the following facts as true if competent, relevant and material, the intervenor, W. A. Nicholls, shall not be concluded, by his admission of the truth of the facts set forth in paragraphs III and IV, hereof, from insisting, at said trial, that the matters and facts set forth in paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII, or either or any of said paragraphs, herein, constituted, and do constitute, a transfer of the stock in controversy, from the complainant to the intervenor, pursuant to the alleged contract set out in the cross-bill of complaint filed, by the intervenor, herein, and that the complainant shall be considered as objecting that the intervenor cannot be heard to so insist upon the ground that such insistence is not responsive to the allegations of the cross-bill of complaint filed, by the intervenor, herein, and is inconsistent herewith, and upon any and all such other and different grounds as may be interposed and specified by complainant in open court at the trial of said cause, and the ruling of the Court on said objections, and each thereof, shall be

considered as excepted to separately by the party against whom such ruling is made; and that the complainant shall be considered as objecting to the matters and facts contained in paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII, herein, upon the grounds that the same are incompetent, immaterial and irrelevant, and upon any and all such other and different grounds as may be interposed and specified by the complainant, in open court, upon the trial of said cause; and that each of the matters and facts, contained in said paragraphs X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII, are considered as objected to separately, by the complainant, upon the above specified grounds, and upon any and all such other and different grounds as may be interposed and specified by the complainant, in open court, upon the trial of said cause, and are subject to the ruling of the Court thereon, and the ruling of the Court on said objections, and each thereof, shall be considered as excepted to separately by the party against whom such ruling is made, which matters and facts are as follows, to wit:

I.

That the complainant now is, and, at and during all the times mentioned in the bill of complaint, herein, was, a citizen of the State of Washington, residing in the city of Colfax, in said State.

II.

That the defendant corporation, Snow Storm Mining Company at, and during all the times mentioned

in the bill of complaint, herein, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and a citizen of such State and resident therein, with its principal place of business at the city of Mullan in said State.

III.

That, on and before the 28th day of November, 1904, the complainant was the owner of fifteen hundred (1500) shares of the capital stock of the defendant corporation, Snow Storm Mining Company, and that said complainant was such owner on the 19th day of December, 1905.

IV.

That, on or about the 28th day of November, 1904, the complainant held and owned a certificate, numbered 1062, signed by the president and secretary of the said defendant corporation, for fifteen hundred (1500) shares of the capital stock of said defendant corporation, and issued, under the seal of the said defendant corporation, to the complainant, which said fifteen hundred (1500) shares of said stock was, on said date, standing in the name of the complainant upon the books of said defendant corporation.

V.

That, on or about the 28th day of November, 1904, the said certificate was destroyed by fire at the city of Colfax, State of Washington.

VI.

That, at and during all the times herein mentioned, the following by-law, of the said defendant corporation, was in full force and effect, to wit:

"ARTICLE VIII.

CERTIFICATES OF STOCK.

Section 1. The capital stock of this Company shall be represented by certificates signed by the President and Secretary under the seal of the Company.

Section 2. Transfers of stock shall only be made on the books of the Company by the Secretary of the Company, upon the surrender of the certificate of stock, and the payment of twenty-five cents which shall go to the Secretary, but no transfer of stock shall be made on the books of the Company until all indebtedness to the Corporation of the person in whose name the stock stands is paid.

Section 3. Any person claiming to have lost a certificate or certificates of stock, may have a new certificate issued to him, by producing satisfactory evidence of having given notice of his loss for sixty days by publication in a newspaper, published in the English language in the city or town of his residence, or if not residing in a city or town in which a newspaper is published, then in a newspaper published in the county in which he resides, and also in the city or county in which he claims to have lost such certificate, and in the city of Mullan, county of Shoshone, State of Idaho, and shall also produce and file with the Secretary his affidavit, setting forth the facts and circumstances of his loss as near as may be, and shall execute a bond of indemnity to the Company in such sums as may be satisfactory to the Board of Directors."

VII.

That, prior to the commencement of this action,

the complainant caused to be published, for a period of sixty days, a notice of the said loss of the said certificate, in a newspaper, published in the English language, in the city of Mullan, county of Shoshone, State of Idaho, and in the city of Colfax, State of Washington, which said city of Colfax, at and during all the times herein mentioned, was, and now is, the place of residence of the complainant, and that, prior to the commencement of this action, the complainant, produced and filed, with the secretary of the said defendant corporation, the affidavit of the publisher of each of said newspapers to the effect that said notice was published, as aforesaid, which affidavit was accompanied by a copy of the notice so published, and also produced and filed, with said secretary the affidavit of the complainant setting forth the facts and circumstances of the destruction of said certificate, as aforesaid, and also demanded, in writing, of the said defendant corporation, that its board of directors prescribe the form of indemnity bond, and the amount thereof, which would be satisfactory to said board of directors, in order that the complainant might execute the same pursuant to section 3 of article VIII, aforesaid, to the end that a new certificate of stock might be issued to the complainant in lieu of that destroyed by fire as aforesaid.

VIII.

That, prior to the commencement of this action, the complainant addressed to the defendant corporation, at Mullan, Idaho, a communication, a copy of which is set out in paragraph XXIV of this stipu-

lation, which communication was received by the defendant corporation in due course of mail, which said copy shall be considered Complainant's Exhibit 1 for the consideration of the Court, and that, in due course of mail, the complainant received from the defendant corporation, in response to said communication, a communication, a copy of which is set out in paragraph XXV of this stipulation, and that the original of such communication shall be marked Complainant's Exhibit 2, and filed in said cause for the consideration of the Court.

IX.

That, since the destruction of said certificate, as aforesaid, the said defendant corporation has paid to persons other than the complainant, divers and sundry dividends on said fifteen hundred (1,500) shares of stock, aggregating the sum of four hundred ninety-five dollars ($495.00), and has failed and refused to pay said sum of four hundred ninety-five dollars ($495.00) or any part thereof to the complainant, and that, if the Court, upon the trial of said cause, shall, upon the evidence, find for the complainant, the judgment and decree herein shall provide for the payment by said defendant corporation to the complainant, of the sum of four hundred ninety-five dollars ($495.00).

X.

That the complainant, on the 20th day of December, 1905, at said city of Colfax, mailed to the intervenor a letter which was received by the intervenor in due course of mail at the city of Spokane,

Washington, which letter was, and is, in the words and figures following, to wit:

"ANDREW JOHNSON,
Distributor.

Colfax, Wash. Dec 20-05

Mr. Wm. A. Nicholls,
Spokane Wash.

Dear Sir: As per our talk over phone yesterday, I send you a Bond in the sum of Five Hundred Dollar to secure delivery of 1500 shares of Snow Storm Stock in seventy days I prefer that the Bond be given to you in person rather than some stranger if you can arrange it that way. I can deliver in that time but suppose a contingency such as delay in mail or neglect of the officers of the company to do their duty and I should be delayed a few days I know that you would not take advantage of that and stick me for $500.00 however I leave it to your own good Judgment.

Respt. ANDREW JOHNSON."

—and that the original of said letter shall be marked Intervenor's Exhibit 1, and filed, in said cause, for the consideration of the Court.

XI.

That the bond, enclosed in the letter last aforesaid, was, and is, in the words and figures following, that is to say:

"Know all men by these presents: That we, Andrew Johnson as principal, and Ed. Harpole and Peter Ericson as sureties, all of the County of Whitman, State of Washington, are held firmly bound unto Wm. A. Nicholls in the penal sum of Five Hun-

dred Dollars, to be paid to the said Wm. A. Nicholls, his executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such, that whereas, said Andrew Johnson claims to be the owner of Fifteen Hundred shares of the capital stock of the Snow Storm Mining Company of Mullan, Idaho, now, in consideration of the payment of the sum of Three Hundred Ninety-seven & 50/100 Dollars to the said Andrew Johnson by the said ————, we, the undersigned, hereby agree to furnish to the said ————, within seventy days from date hereof, a certificate of stock for 1500 shares of the capital stock of the said Snow Storm Mining Company; now, if the said Andrew Johnson shall well and truly furnish the said 1500 shares of the capital stock of the said Snow Storm Mining Company to the said ———— within the time herein specified, then this obligation is to be void and of no effect; otherwise to remain and be in full force and virtue.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Dated Dec. 19th, 1905.

ANDREW JOHNSON. [Seals]
ED HARPOLE. [Seals]
PETER ERICSON. [Seals]

State of Washington,
County of Whitman,—ss.

————, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself, says, that he is a resident of the County of Whitman, State of Washington, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ED HARPOLE.
PETER ERICSON.

Subscribed and sworn to before me this 19th day of December, 1905.

S. D. O'NEAL,
Notary Public Residing at Colfax, Washington.
[S. D. O'Neal, Notary Public, State of Washington. Commission expires Sept. 9, 1908.]"

—and that the original of said bond shall be marked Intervenor's Exhibit 2, and filed in said cause for the consideration of the Court.

XII.

That the complainant, on the 29th day of December, 1905, at said city of Colfax, mailed, to the defendant corporation, a letter which was received, by the defendant corporation, in due course of mail, at said city of Mullan, which letter was, and is, in the words and figures following, that is to say:

"Colfax, Wash., Dec. 29, 1906.

ANDREW JOHNSON, DISTRIBUTOR.

Secretary Snow Storm Mining Co.,
Mullan, Idaho.

Dear Sir: I send you under separate cover copy of the 'Colfax Gazette' in which is a notice that explains itself. A similar notice running in your Mullan paper. These notices will continue for sixty days.

You will greatly favor me if you will send me a statement over the seal and signature of the Snow Storm Co. to the effect that I am the owner of 1500 shares of Snow Storm stock and that a certificate of same will be issued to me soon as these notices have run the agreed length of time,—sixty days.

I have sold this stock and have given a Bond to the purchaser to deliver same in sixty days. Now he wants a statement from you that I own this stock and that you will issue this certificate soon as I have complied with the Law in the case. Please let me hear from you soon as possible.

Respectfully yours,

ANDREW JOHNSON."

—and that said copy shall be considered Intervenor's Exhibit 3 for the consideration of the Court.

XIII.

That, in due course of mail, the complainant received, at said city of Colfax, from the defendant corporation, a letter in reply to the letter, last afore-

said, which reply was, and is, in the words and figures following, that is to say:

"Office of
SNOW STORM MINING CO.
Mullan, Idaho.

Jan. 2, 1905.

Mr. Andrew Johnson,
Colfax, Wash.

Dear Sir: Replying to yours of Dec. 29th, will say that after examining our records we find that you are the holder of 1500 shares of Snow Storm Stock, and will, after notices have run 60 days, and upon receipt of your affidavit stating the facts and circumstances as near as possible, together with bond for 1 year of indemnity to the Company of 25¢ per share ($375.00) properly executed, issue *issue* to you a new certificate for 1500 shares.

Yours truly,
THE SNOW STORM MINING CO.
C. D. MILLER, Secy."

—and that the original of said letter shall be marked Intervenor's Exhibit 4, and filed, in said cause, for the consideration of the Court.

XIV.

That the complainant, at said city of Colfax, on the 4th day of January, 1906, enclosed, to the intervenor, the above-mentioned reply, in a letter which was received, by the intervenor, in due course of mail, at said city of Spokane, and which letter was, and is, in the words and figures following, that is to say:

"ANDREW JOHNSON,
Distributor.

Colfax, Wash., Jan. 4-06.

Mr. Wm. A. Nicholls,

Spokane, Wash.

Dear Sir: I enclose you letter from the Secretary of the Snow Storm Co. that I think ought to satisfy your client the notices are now running in papers at Mullan and Colfax.

I cannot use any Duglass at present at 3½ cents but may later on.

Yours truly,

ANDREW JOHNSON."

—and that the original of said letter shall be marked Intervenor's Exhibit 5, and filed, in said cause, for the consideration of the Court.

XV.

That the intervenor on the 24th day of February, at said city of Spokane, mailed to the defendant corporation a letter which was received, by the defendant corporation, in due course of mail, at said city of Mullan, which letter was and is in the words and figures following, that is to say:

"Feb. 24, 1906.

Mr. C. D. Miller,

Scty. Snow Storm Mining Co.,

Mullan, Idaho.

Dear Sir: I have a letter written to Andrew Johnson by yourself on January 2nd informing that the 1,500 shares of stock which was lost would be reissued providing a bond for $375.00 was properly executed after due notice had been given for 60 days in the newspapers.

I have purchased this stock and Mr. Johnson has given me bond for delivery of same. Are you ready to reissue the shares upon the execution of the bond? I believe this notice has been published for at least 60 days.

Respectfully,

(Signed) W. A. NICHOLLS."

—and that said copy shall be considered Intervenor's Exhibit 6 for the consideration of the Court.

XVI.

That the intervenor, on the 24th day of February, 1906, at said city of Spokane, mailed a letter to the complainant, which was received, by the complainant in due course of mail, at said city of Colfax, a copy of which letter was, and is, in the words and figures following, that is to say:

"Feb. 24, 1906.

Mr. Andrew Johnson,

Colfax, Wash.

Dear Sir: The seventy days which you have under the terms of the bond given me to make delivery of 1,500 shares of Snow Storm at 26½ cents, will expire on the 27th of this month. The party to whom I sold the stock wishes to know if you will be able to make delivery on that date.

Please advise me at once, as I am obliged to give him an answer.

Respectfully,

W.A.N. W. A. NICHOLLS."

—and that the original of said letter has been lost, mislaid or destroyed, and that said copy shall be con-

sidered Intervenor's Exhibit 7, in said cause, for the consideration of said Court.

XVII.

That the defendant corporation, on the 26th day of February, 1906, at said city of Mullan, mailed a letter to the intervenor, which letter, together with the certificate of stock therein mentioned and described, which said certificate was issued in the name of the intervenor, was received by the intervenor, in due course of mail, at said city of Spokane, which letter was, and is, in the words and figures following, that is to say:

"Office of

SNOW STORM MINING CO.

Mullan, Idaho.

Feb. 26, 1906.

Mr. William A. Nichols,
Spokane, Wash.

Dear Sir: Replying to yours of the 24th inst. If you will write us a personal letter guaranteeing these 1500 shares of stock it will not be necessary to furnish bond. We are enclosing you herewith certificate 1705 for 1500 shares.

Trusting that this will be much easier for you, we remain,

Yours truly,
W. D. GREENOUGH."

—and that the original of said letter shall be considered Intervenor's Exhibit 8, in said cause, for the consideration of the Court.

XVIII.

That the intervenor, on the 1st day of March, 1906, at said city of Spokane, mailed to the defendant corporation, a letter, which was received by the defendant corporation, in due course of mail, at said city of Mullan, which letter was, and is, in the words and figures following, that is to say:

"Mar. 1, 1906.

Mr. W. D. Greenough,
c/o Snow Storm Mining Co.,
Mullan, Idaho.

Dear Sir: I beg to thank you for your favor of the 26th ulto., enclosing Certificate #1705/ for 1,500 shares Snow Storm Mining Co. stock.

I appreciate this accommodation, dispensing with all red tape, and I will agree to protect the Snow Storm Mining Co. in case anyone should turn up later, claiming to own these shares.

By way of explanation, I wish to add that I purchased this block of 1,500 shares from Andrew Johnson on December 19th, 1905, as I remember it. He executed an indemnifying bond in the sum of $500.00 to protect me against loss in case of failure to deliver the stock within 70 days from date. He wanted the money at that time and I agreed to pay him, providing he would get a note from the Secretary of the Company to the effect that the stock would be delivered to me within 70 days from date. Johnson then wrote to Mr. Miller and I have the latters' reply advising that he would issue the stock after notice had run for 60 days, providing the bond

of indemnity were given to the company of $375.00, to remain in force for one year. I then wrote to Mr. Johnson, requesting that he execute this bond when I would be perfectly willing to pay him for the shares. He did not respond to my letter and I again wrote him on January 29th, making request that he arrange to deliver the stock promptly, but received no answer. Accordingly, I made him a legal tender for the stock within the 70 days, at Colfax, supposing, of course, that he was prepared to make delivery, and was willing to do so, since he had never indicated a desire to repudiate. I received a letter from him last night, informing that he did not intend to make delivery of the stock, but that he would do anything which he considered reasonable to make me whole in the transaction.

It is a plain case of a man's trying to welch on trade because the stock had advanced in price in the meantime. I have consulted my attorneys, Messrs. Happy & Hindman, in all the steps taken, and am advised that Johnson has no possible claim to this stock; that my bond is perfectly regular and that had he failed to deliver the stock, I could have collected $500.00 damages at once.

I will hold this certificate of Snow Storm just issued, until this matter is entirely cleaned up to your satisfaction. When I wrote you advising that I had purchased the shares, it never occurred to me for a moment that Johnson would try to avoid the obligation.

I will protect you in every respect, but there is no question as regards the validity of my claim, for I

have proofs, and any statements from Mr. Johnson to the contrary are false.

Respectfully,

W. A. NICOLLS."

WAN.

—and that the original of said letter has been lost, mislaid or destroyed, and that the above copy thereof, shall be considered Intervenor's Exhibit 9, in said cause, for the consideration of the Court.

XIX.

That the complainant, on the 27th day of February, 1906, at said city of Colfax, mailed, to the intervenor, a letter which was received, by the intervenor, in due course of mail, at said city of Spokane, which letter was, and is, in the words and figures following, that is to say:

"Colfax, Wash., Febr. 27, 1906.

Mr. W. A. Nichols,

Spokane, Wash.

Dear Sir: Mr Coman of the Colfax Nat Bank tendered me money to day for 1500 shares of snow storm which I refused to axcept for this reason, your client has failed to meet any of the conditions provided in the Bond which I gave to you you will remember when I was in Spokane. I agreed to get a statement from the secretary of the Snow Storm to the effect that the Books showed me to be the owner of 1500 shares upon this statement and the Bond I gave you—you were to pay me 26½¢ for my stock. you refused to do this but submitted a counter proposition namely that I should give to the Snow Storm Co a Bond. this I have never

agreed to do, and I have considered the trade off since your Clients refusal to pay me my money after I had complied with all the conditions to which I agreed when in Spokane now the publication has run the required length of time but oweing to the fact this Bond which I must give to the Co. is of an unusual nature it must be submitted to the Home office of the Bonding Co which will require some time however I will soon be in position to deliver the stock and when I am I shall be glad to do business with you at what ever price the market may be at that time.

You will understand the escence of the contract I made with you was the payment to me of the purchase price you having failed to do this makes the Bond void and of none effect. I hope I have made my position clear in this matter and I desire to assure you that I will do anything in reason, to adjust this difficulty so that no one shall be the looser, that is in my power.

Respt Yours

ANDREW JOHNSON."

—and that the original of said letter shall be considered Intervenor's Exhibit 10, in said cause, for the consideration of the Court.

XX.

That the money referred to in the letter, last aforesaid, was the sum of $397.50 tendered, by the intervenor, through Mr. Coman, to the complainant, on the 27th day of February, 1906, as the purchase price for the fifteen hundred (1500) shares of the capital stock of the defendant corporation now in controversy in this cause.

XXI.

That the intervenor, on the 1st day of March, 1906, at said city of Spokane, mailed, to the complainant, a letter, which was received by the complainant, in due course of mail, at said city of Colfax, which letter was, and is, in the words and figures following, that is to say:

"Mar. 1, 1906.

Mr. Andrew Johnson,
Colfax, Wash.

Dear Sir: Your favor of the 27th ulto. at hand. I cannot agree with you in many of your statements. When you were in Spokane, I informed you that providing you could secure an agreement from the Secretary of the Company to issue me the 1,500 shares of Snow Storm after notice had run in the papers for 60 days, advising the public of the loss of the stock, that I would pay you the stipulated price of 26½ cents per share. You agreed to do this and later sent me a letter from the Secretary in which he states that the stock would be issued in due time if you would file an indemnity bond at the rate of 25 cents per share, or $275.00. I wrote, requesting you to attend to this, but received no reply. Then on January 29th, I again wrote, requesting that you make arrangements to deliver promptly, further stating that I had closed the trade and had never received any advise from you calling it off. When you left here in December, *I*t was agreed that if the trade did not stand, you were to write me to that effect at once and ask for the return of the bond. I have consulted my attorneys Messrs.

Happy & Hindman in every step taken by myself. They have examined the bond carefully and state that it is valid absolutely, and can be enforced.

It would have been unreasonable to ask me to put up 26½ cents per share, amounting to $397.50 and further, to file a bond with the Secretary at 25 cents per share, or $375.00 more, since your bond only protected me in the sum of $500.00, whereas I would be out $772.50, in case anyone else contested my right to the shares.

I wrote to the Secretary several days ago and informed him that I had purchased the stock from you, and he promptly issued a certificate in my name and sent it to me. You acknowledged in your letter that the money was tendered to you by the Bank at Colfax, which you refused. I now enclose my check for $397.50, in full payment for the 1,500 shares which you sold me at 26½ cents.

Respectfully,

W. A. NICHOLLS."

Enc.

—and that the original of said letter has been lost, mislaid or destroyed, and that above copy thereof shall be considered Intervenor's Exhibit 11, in said cause, for the consideration of the said Court.

XXII.

That the complainant, at said city of Colfax, on the 2d day of March, 1906, mailed, to the intervenor, a letter which was received, by the intervenor, in due course of mail, at said city of Spokane, which letter was, and is, in the words and figures following, that is to say:

"Colfax, Wash., Mch. 2, 1906.

Mr. Wm. A. Nichols,

Spokane, Wash.

My Dear Sir: I received your letter today with Dft for $397.50. which I herewith return to you. no matter how this dificulty is settled between you and I. this money is not mine until I can deliver the stock to you you say that you have received a certificate for this stock from the Secretary of the Snow Storm Co. well they will have to deliver to *Me*. I am the owner of that stock no matter what the courts may decide in our case.

Respt. Yours,

ANDREW JOHNSON."

—and that the original of said letter shall be considered Intervenor's Exhibit 12, in said cause, for the consideration of the Court.

XXIII.

That the intervenor, at said city of Spokane, on the 12th day of March, 1906, mailed, to the complainant, a letter which was received, by the complainant, in due course of mail, at said city of Colfax, a copy of which letter was, and is, in the words and figures following, that is to say:

"Mar. 12, 1906.

Mr. Andrew Johnson,

Colfax, Wash.

Dear Sir: Your favor of March 2d, enclosing check for $397.50 at hand. I trust that you will look at this matter in the right light and accept my tender for the money which is ready at any time.

As informed before, the Secretary issued the stock to me and sent the certificate. He recently sent me your original letter to him wherein you state that the stock had been sold and that you had put up a bond to make delivery.

This is a plain case and there is no use in your haggling over it further.

I am in the market to buy,

Oom Paul at 15 cents.
Tarbox at 3 1-2.
Humming Bird at 8.
Moonlight at 4 1-4.

Respectfully,

WAN. W. A. NICHOLLS."

—and that the original of said letter has been lost, mislaid or destroyed, and that the above copy thereof shall be considered Intervenor's Exhibit 13, in said cause, for the consideration of the said Court.

XXIV.

That the following communication is the first communication mentioned and described in paragraph VIII of this stipulation, viz.:

"Colfax, Wash., June 17th, 1907.

Snow Storm Mining Company,
Mullan, Idaho.

Gentlemen: I hand you, herewith, in accordance with Section 3 of Article VIII of your By Laws, the affidavit of D. C. Coates, the publisher of 'The Mullan Miner,' a weekly newspaper published in the English language, that notice of loss of stock certificate numbered 1062 calling for 1500 shares of

the capital stock of the Snow Storm Mining Company, was published in said newspaper from December 23, 1905, to February 27, 1906; also the affidavit of Ivan Chase, the publisher of the 'Colfax Gazette,' a weekly newspaper, published in the English language, that notice of loss of stock certificate numbered 1062, calling for 1500 shares of the capital stock of the Snow Storm Mining Company, was published in the said newspaper from April 5 to June 7, 1907.

I, also, hand you, herewith, my affidavit setting forth the facts and circumstances of my loss of the stock certificate above mentioned and described.

I have the honor to request that, on the first Monday of July, next ensuing, the date of a regular meeting of your Board of Directors, your Board of Directors shall prescribe the form of indemnity bond, and the amount thereof, which will be satisfactory to said Board of Directors, in order that I may execute the same pursuant to Section 3 of Article VIII of your By Laws, to the end that a new certificate of stock may be issued to me in lieu of that destroyed by fire as aforesaid.

Very truly yours,

ANDREW JOHNSON."

XXV.

That the following communication is the last communication mentioned and described in paragraph VIII of this stipulation, viz.:

"Office of
Snow Storm Mining Co.
Mullan, Idaho.

July 13, 1907.

Mr. Andrew Johnson,
Colfax, Wash.

Dear Sir: Referring to your application of June 17th, I beg to advise you that at the regular meeting of the Board of Directors of Snow Storm Mining Company, held at Mullan, Idaho, on July 9th, they refused to fix the form or amount of indemnity bond, and request that I advise you that a duplicate certificate will not be issued, for the reason as you already know this certificate has been issued to W. A. Nichols, as per your letter of December 29th, 1905.

Yours truly,
SNOW STORM MINING CO.
By JNO. MOCINE,
Sec'y."

JM-B.

XXVI.

That the above and foregoing papers writing constitute all of the written evidence having any bearing upon the questions in issue between the parties to this litigation, or any of them.

XXVII.

That the value of the stock, in controversy herein, fluctuates daily, and has so fluctuated since the 19th day of December, 1905.

It is further stipulated and agreed that nothing herein contained shall be construed as depriving

either or any of the said parties of the right to offer, upon the trial of said cause, oral evidence upon any point in issue, subject to such objections as may be urged thereto upon such trial.

It is further stipulated and agreed that the matters and facts, herein stipulated, and such oral evidence as may be offered at such hearing, shall, subject to all the objections aforesaid, be considered, on final hearing, by the Court, to all intents and purposes as if taken and reduced to writing by an examiner in equity, and the Court shall render, and cause to be entered, in said cause, such decree and judgment as the Court shall determine should be rendered, and entered, upon such matters and facts and such oral evidence, after giving full consideration to the objections aforesaid.

VOORHEES & VOORHEES,
Solicitors for Complainant.

HAPPY & HINDMAN,
Solicitors for Defendant Corporation and Intervenor.

[Endorsed]: Filed Nov. 12, 1908. A. L. Richardson, Clerk U. S. Circuit Court. By W. W. Griffith, Deputy.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Stipulation [for Trial November 17, 1908].

It is hereby stipulated and agreed, by and between Voorhees & Voorhees, solicitors for Andrew Johnson, complainant above named, and Happy & Hindman, solicitors for Snow Storm Mining Company, a corporation, defendant above named, and for W. A. Nicholls defendant and intervenor above named, that the above-entitled cause shall be tried, in said court, at Moscow, Idaho, on the 17th day of November, 1908.

VOORHEES & VOORHEES,
Solicitors for Complainant, Andrew Johnson.

HAPPY & HINDMAN,
Solicitors for Defendant, Snow Storm Mining Company, and for Defendant and Intervenor, W. A. Nicholls.

[Endorsed]: Filed Nov. 12, 1908. A. L. Richardson, Clerk. By M. W. Griffith, Deputy.

Complainant's Exhibit No. 2.

Office of

SNOW STORM MINING CO.

Mullan, Idaho.

July 13, 1907.

Mr. Andrew Johnson,
Colfax, Wash.

Dear Sir: Referring to your application of June 17th, I beg to advise you that at the regular meeting of the Board of Directors of Snow Storm Mining Company, held at Mullan, Idaho, on July 9th, they refused to fix the form or amount of indemnity bond, and request that I advise you that a duplicate certificate will not be issued, for the reason as you already know this certificate has been issued to W. A. Nichols, as per your letter of December 29th, 1905.

Yours truly,
SNOW STORM MINING COMPANY,
By JNO. MOCELLE,
Secy.

JM-B.

Introduced Nov. 17, 1908.

Intervenor's Exhibit No. 1.

Colfax, Wash., Dec. 20, 1905.

Mr. Wm. A. Nicholls,

Spokane, Wash.

Dear Sir: As per our talk over phone yesterday, I send you a Bond in the sum of Five Hundred Dollars to secure delivery of 1500 shares of Snow Storm Stock in seventy days. I prefer that the Bond be given to you in person, rather than some stranger, if you can arrange it that way. I can deliver in that time, but suppose a contingency, such as delay in mail, or neglect of the officers of the Company to do their duty, and I should be delayed a few days. I know that you would not take advantage of that, and stick me for $500.00, however, I leave it to your own good judgment.

Respt.

ANDREW JOHNSON.

Introduced Nov. 17, 1908.

Intervenor's Exhibit No. 2.

Know all men by these presents: That we, Andrew Johnson as principal, and Ed. Harpole and Peter Ericson as sureties, all of the County of Whitman, State of Washington, are held and firmly bound unto Wm. A. Nicholls in the penal sum of Five Hundred Dollars, to be paid to the said Wm. A. Nicholls, his executors, administrators or assigns; to which payment well and truly to be made, we

bind ourselves, our heirs, executors, and administrators, firmly by these presents.

The condition of this obligation is such, that whereas, said Andrew Johnson claims to be the owner of Fifteen Hundred shares of the capital stock of the Snow Storm Mining Company of Mullan, Idaho, Now, in consideration of the payment of the sum of Three Hundred Ninety-seven and 50/100 Dollars to the said Andrew Johnson by the said ————, we, the undersigned, hereby agree to furnish to the said ————, within seventy days from date hereof, a certificate of stock for 1500 shares of the capital stock of the said Snow Storm Mining Company; now if the said Andrew Johnson shall well and truly furnish the said 1500 shares of the capital stock of the said Snow Storm Mining Company to the said ———— within the time herein specified, then this obligation is to be void and of no effect; otherwise to remain and be in full force and virtue.

In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

Dated Dec. 19th, 1905.

ANDREW JOHNSON. (Seals)
ED. HARPOLE. (Seals)
PETER ERICSON. (Seals)

State of Washington,
County of Whitman,—ss.

————————, the sureties whose names are subscribed to the above undertaking, being severally

duly sworn, each for himself, says, that he is a resident of the County of Whitman, State of Washington, and is worth the sum in the said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

ED. HARPOLE.
PETER ERICSON.

Subscribed and sworn to before me this 19th day of December, 1905.

[Seal] S. D. O'NEAL.
Notary Public, Residing at Colfax, Wash.

Introduced November 17, 1908.

Intervenor's Exhibit No. 4.

Office of

SNOW STORM MINING CO.

MULLAN, IDAHO.

Jan. 2, 1905.

Mr. Andrew Johnson,
Colfax, Wash.

Dear Sir: Replying to yours of Dec. 29th, will say that after examining our records we find that you are the holder of 1500 shares of Snow Storm Stock, and will, after notices have run 60 days, and upon receipt of your affidavit stating the facts and circumstances as near as possible together with bond for 1 year of indemnity to the Company of 25¢ per

share ($375.00) properly executed, issue to you a new certificate for 1500 shares.

Yours truly,

THE SNOW STORM MINING CO.

C. D. MILLER.

Sec'y.

Introduced Nov. 17, 1908.

Intervenor's Exhibit No. 5.

Colfax, Wash., Jan. 4, 1906.

Mr. Wm. A. Nicholls,

Spokane, Wash.

Dear Sir: I enclose you, letter from the Secretary of the Snow Storn Co. that I think ought to satisfy your client. The notices are now running in papers at Mullan and Colfax.

I can not use any Duglass at present at 3½ cents, but may later on.

Yours truly,

ANDREW JOHNSON.

Introduced Nov. 17, 1908.

Intervenor's Exhibit No. 8.

Office of

SNOW STORM MINING CO.

Mullan, Idaho.

Feb. 26, 1906.

Mr. William A. Nichols,

Spokane, Wash.

Dear Sir: Replying to yours of the 24th inst. If you will write us a personal letter guaranteeing these 1500 shares of stock it will not be necessary to

furnish bond. We are enclosing you herewith certificate 1705 for 1500 shares.

Trusting that this will be much easier for you, we remain,

Yours truly,
W. D. GREENAUGH.

Introduced Nov. 17, 1908.

Intervenor's Exhibit No. 10.

Colfax, Wash., Feb. 27, 1906.

Mr. W. A. Nichols,
Spokane, Wash.

Dear Sir: Mr. Coman of the Colfax Nat. Bank tendered me money today for 1500 shares of snow storm stock which I refused to accept for this reason. Your client has failed to meet any of the conditions provided in the Bond which I gave to you, you will remember when I was in Spokane. I agreed to get a statement from the Secretary of the Snow Storm to the effect that the books showed me to be the owner of 1500 shares. Upon this statement and the Bond I gave to you, you were to pay me 26½¢ for my stock. You refused to do this, but submitted a counter proposition; namely, that I should give to the Snow Storm Co. a Bond. This I have never agreed to do, and I have considered the trade off since your clients refusal to pay me my money after I had complied with all the conditions to which I agreed when in Spokane.

Now the publication has run the required length of time, but oweing to the fact this Bond which I must give to the Company is of an unusual nature, it must be submitted to the Home office of the Bond-

sidered by said defendant and defendant and intervenor in their said brief:

It is hereby stipulated and agreed, by and between Voorhees & Voorhees, solicitors for complainant, and Happy & Hindman, the solicitors for the defendant, Snow Storm Mining Company, and the defendant and intervenor, William A. Nicholls, that the said complainant shall have until the 15th day of January, 1909, in which to serve upon the said solicitors for the defendant, Snow Storm Mining Company, and the defendant and intervenor, William A. Nicholls, and file in the office of the clerk of said court, his brief in reply to the said brief so filed by the said defendant and defendant and intervenor, as aforesaid, and that the said defendant, Snow Storm Mining Company, and the said defendant and intervenor, William A. Nicholls, shall have until the 15th day of February in which to serve upon the solicitors for the complainant, and file in the office of the clerk of said court, an answer brief to the said briefs of complainant, and each of them.

It is further stipulated and agreed that all of the briefs, above referred to, shall be considered, by the Court, to all intents and purposes, as if they, and each of them, had been filed in the office of the said clerk at the same time as copies thereof were furnished to the solicitors herein, anything, in Rule 53

of the Rules of said Court, to the contrary notwithstanding.

VOORHEES & VOORHEES,
Solicitors for Complainant.
HAPPY & HINDMAN,
Solicitors for Defendant, Snow Storm Mining Company, and for Defendant and Intervenor, William A. Nicholls.

[Endorsed]: Filed Dec. 21, 1908. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial District.

ANDREW JOHNSON,
Complainant,
vs.
SNOW STORM MINING COMPANY (a Corporation),
Defendant,
and
W. A. NICHOLLS,
Defendant and Intervenor.

Stipulation [Filed January 13, 1909, Re Briefs].

It is hereby stipulated and agreed by and between Messrs. Voorhees & Voorhees, solicitors for the complainant, above named, and Messrs. Happy & Hindman, solicitors for the above-named defendant, Snow Storm Mining Company, and the above-named defendant and intervenor, W. A. Nicholls, that by

reason of the protracted illness of C. S. Voorhees, a member of the said firm of Voorhees & Voorhees, having particular charge of the above-entitled cause, on behalf of complainant, that the time within which the said complainant shall serve and file his brief in reply to the brief heretofore filed and served in said cause on behalf of said defendant Snow Storm Mining Company, and said defendant and intervenor W. A. Nicholls, shall be and the same is hereby enlarged and extended to and including the first day of March, 1909, and that thereupon the said defendant Snow Storm Mining Company and the said defendant and intervenor W. A. Nicholls shall have to and including the 1st day of April, 1909, within which to serve and file such brief as they may see fit to serve and file, in reply to such brief of said complainant.

Dated at Spokane, Washington, this 9th day of January, 1909.

VOORHEES & VOORHEES,
Solicitors for Complainant.

HAPPY & HINDMAN,
Solicitors for Defendant, Snow Storm Mining Company, and for the Defendant and Intervenor, W. A. Nicholls.

[Endorsed]: Filed Jan. 13, 1909. A. L. Richardson, Clerk.

Testimony.

[Proceedings Had November 17, 1908.]

In the Circuit Court of the United States in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Messrs. VOORHEES & VOORHEES, Solicitors for Complainant, Andrew Johnson.

Messrs. HAPPY & HINDMAN, Solicitors for Defendant, Snow Storm Mining Company, and for Defendant and Intervenor, W. A. Nicholls.

(Moscow, Idaho, November 17, 1908.)

Mr. VOORHEES.—We have stipulated, if your Honor please, substantially all of the facts, and I understand from Mr. Hindman that he has an offer which he desires to make of what he would prove by Mr. Nicholls, if Mr. Nicholls could be here. Mr. Nicholls met with a very great bereavement, one of these automobile accidents, in which his sister was

killed, and I have agreed with Mr. Hindman that he can make his offer and I will object to it, which will precipitate, if your Honor pleases, the crux of this litigation. And it is agreed between us, if your Honor should hold, that if the offer contains competent and material evidence, that that is exactly what Mr. Nicholls would testify to if he were here. It then becomes, I presume, the most expeditious way for Mr. Hindman to make his offer, and I shall make my objection, which objection will go also to very much of the stipulated facts. And if Mr. Hindman will make his offer now, I will make my objections not only to his offer, but to all of the facts which have been stipulated in the stipulation as to facts. And in the argument, if your Honor pleases, upon the objection to his offer, I think the entire case, the law of the case, can be presented, and I will therefore wait, if it is agreeable to Mr. Hindman, so that he may make his offer, and I will then make my objection.

Mr. HINDMAN.—I now offer to prove: That W. A. Nicholls, the intervenor, is now, and has been for the last ten years, a resident and citizen of the city of Spokane, county of Spokane, State of Washington, and has been, at all of said times, engaged in the business, in said city, of brokerage, in buying and selling stocks, to the knowledge of the complainant herein, Andrew Johnson. That on the 19th day of December, 1905, the complainant herein, Andrew Johnson, had a conversation with the intervenor, W. A. Nicholls, in the course of which he stated that he was the owner of fifteen hundred shares of the stock

of the Snow Storm Mining Company, for which he had lost the certificate, and which he offered to sell to the said Nicholls at twenty-six and a half (26½) cents per share. The said Nicholls stated that he would take the stock at that price, as he had a client who would take it off his hands. The said Johnson at that time stated that he would take whatever steps were necessary to procure a certificate for the said fifteen hundred shares from the Snow Storm Mining Company; but that it would be about seventy days before he could procure a new certificate in lieu of the one he had lost. The said Johnson further stated that he would procure from the secretary of the Snow Storm Mining Company a statement that he was the owner of fifteen hundred shares of the company's stock, and that a certificate would be issued to him or his order at the end of seventy days; and the said Nicholls agreed to pay the purchase price for the stock upon the receipt of such statement from the secretary of the company, it being agreed that Johnson was to give a bond for the sum of $500 for the delivery of the certificate within seventy days. At that time the said Nicholls had no knowledge or information as to the conditions which would be required, or the terms which would be imposed by the Snow Storm Mining Company or its by-laws as a condition of the issuance of a new certificate of stock in lieu of the lost certificate.

That this was the only transaction ever had between the complainant and the intervenor, W. A. Nicholls, in reference to fifteen hundred shares of the capital stock of the Snow Storm Mining Com-

pany, and that all the letters covered by the stipulation filed in this case refer to that transaction alone.

In the letter from the Snow Storm Company to Nicholls, dated February 25, 1906, that the Snow Storm Company enclosed to Nicholls a certificate of the shares of stock in question, which certificate was for fifteen hundred shares. That is practically our offer.

Mr. VOORHEES.—This offer is made in addition to and supplemental to the facts as they are admitted in the stipulation as to the facts?

Mr. HINDMAN.—That is it exactly.

Mr. VOORHEES.—We object to this offer of the evidence of W. A. Nicholls for the reason, first, that the intervenor has shown no legal or equitable right to intervene herein; second, that the contract of sale alleged in the cross-complaint filed herein is such a contract as the statute of frauds of each of the States of Idaho and Washington requires to be in writing, and that said offer or proof could not establish any right of the intervenor against the complainant, because parol evidence is not admissible for the purpose of supplying the terms and conditions of a contract which is required by the statute to be in writing, under the statute of frauds; further, that the matters and facts appearing in the stipulation as to facts now on file in this court show that the terms of the alleged contract of sale as set forth in the cross-complaint cannot be established otherwise than by parol, and that the alleged contract is therefore invalid, and is not good and valid under the statute of

frauds of either the State of Idaho or the State of Washington.

At this time, if your Honor pleases, I avail myself of the privileges accorded me in the stipulation as to facts, to object on the following grounds to the matters and facts contained in certain paragraphs of that stipulation. I object as follows: Complainant objects to the admission in evidence and the consideration by the court of the matters and facts contained in paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of the stipulation as to the facts, on file herein, for the reasons, first, that said matters and facts, or any of them, do not prove, or tend to prove, the contract of sale alleged in the cross-complaint of intervenor herein, or any contract of sale; second, that said matters and facts, or any of them, do not contain facts sufficient to constitute a defense, or to constitute a cause of action against complainant, or at all; third, that the intervenor has shown no legal or equitable right to intervene herein; fourth, that the contract of sale alleged in the cross-complaint is such a contract as the statute of frauds requires to be in writing, and that the said matters and facts do not establish a sufficient memorandum in writing of the terms of the contract of sale, but, on the contrary, such matters and facts show that the terms of said contract cannot be established, and that said contract is not good and valid under the statute of frauds of either of the states of Idaho or Washington.

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[Testimony of Andrew Johnson, in His Own Behalf.]

ANDREW JOHNSON, being first duly sworn as a witness in his own behalf, testified as follows:

Direct Examination.

By Mr. VOORHEES.—If your Honor please, it will, of course, be understood that in presenting Mr. Johnson as a witness, I am waiving none of the positions which I have assumed, and that I am still standing upon my objection to the introduction of any oral testimony.

The COURT.—That is understood.

Mr. VOORHEES.—Q. Tell the Court your name.

A. Andrew Johnson.

Q. You are at present residing at Dayton?

A. Yes, sir.

Q. In the State of Washington?

A. Yes, sir.

Q. On the 19th of December, 1905, where were you residing? A. Colfax, Washington.

Q. At that time were you acquainted with William A. Nicholls? A. Yes, sir.

Q. At that time you knew Mr. Nicholls' business, did you, in Spokane? A. Yes, sir.

Q. Will you please state to the Court whether or not, on the 19th of December, 1905, you had a conversation with William A. Nicholls. A. I did.

Q. Where were you at the time that conversation occurred? A. In Colfax, Washington.

Q. Where was he?

A. In Spokane, Washington.

(Testimony of Andrew Johnson.)

Q. How did the conversation occur?

A. It occurred over the Pacific States Long Distance Telephone.

Q. Will you state to the Court exactly the conversation that occurred between you and William A. Nicholls at that time.

A. I will. I had occasion to consult with Mr. Nicholls with reference to fifteen hundred shares of Snow Storm Stock which I owned and desired to sell. I went to the telephone office and called Mr. Nicholls up and told him that I had fifteen hundred shares of stock I wanted to sell, but, owing to the *hundred shares of stock I wanted to sell, but, owing to* the fact that I had lost the certificate by fire, I was unable to deliver the certificate, and I asked him if there was any way in which we could arrange for the sale, so that I could make the sale now and deliver the stock afterwards; and he said that he thought there was, and he suggested that I give him a bond for $500 to insure delivery in seventy days, or in the time it would require, according to the by-laws of the company, to comply with those laws. I would have to advertise it, you see, for sixty days. So he told me that he could use the stock if we could arrange it that way, for twenty-six and a half cents; that he thought he had a client who would take it up, and I agreed to it. I immediately went,—as near as I can recollect I think it was the same day—I went and had a bond made out.

Q. What was said during the conversation, if any-

(Testimony of Andrew Johnson.)
thing, about when the price was to be paid, when the money was to be paid you for your stock?

A. On receipt of the bond I was to give him. So I went and had the bond made out. I think I went to Mr. Charles Hill and stated the circumstances to him and all about it, so that he would have some idea as to what the nature of that bond would be. I also went and saw two friends, and stated the circumstances to them, and asked them if they would go on the bond with me, that I was very desirous of making this sale, because I was hard up and needed the money; and Mr. Harpool and Mr. Erickson, friends of mine, consented to go on the bond. I had the bond made out and signed and acknowledged before a notary, and sent it to Mr. Nicholls.

Q. This paper, which is marked Intervenor's Exhibit 2, is the bond which you had prepared at that time and which you sent to Mr. Nicholls?

A. Yes, sir.

Q. Now, after you had the bond prepared and had it executed, as you have detailed, and sent it to Mr. Nicholls, tell the Court what transpired then.

A. Well, I followed the bond in person to Spokane, I think the following day.

Q. What did you do that for, Mr. Johnson?

A. I done it—I wanted to go to Spokane then anyway, and I thought there might possibly be some hitch in the matter.

Q. What did you expect with respect to getting the money?

A. I expected to get the money.

(Testimony of Andrew Johnson.)

Mr. HINDMAN.—I object to that and move to strike out the answer.

The COURT.—The motion is allowed. It may be stricken out.

Mr. VOORHEES.—Do I understand, if your Honor please, that I can't show the intention with which the witness acted in connection with this matter?

The COURT.—That is the ruling of the Court. He has answered it and it is in the record.

Mr. VOORHEES.—Q. About when was it that you reached Spokane with reference to the date of this bond?

A. Well, in all probability, it was a day after, possibly on the 21st. I couldn't say positively, because I don't remember whether I mailed the bond on the 19th or not, but at any rate he wouldn't have gotten it until the 20th. It is possible that it was on the 20th.

Q. Very shortly thereafter?

A. Yes, sir.

Q. Did you have any conversation with Nicholls on the occasion of your visiting Spokane, as you have described? A. Yes, sir, I did.

Q. Tell the Court what conversation you had with him then.

A. I went in when I got to Spokane and called on Mr. Nicholls, and he had the bond there and seemed to be satisfied with it, and we talked matters over a little bit, and I gave him to understand that I was expecting my money. Mr. Nicholls then stated to

me that he hadn't so understood it from the conversation we had over the telephone the day before, and he said that he was unable to get his client to come through, that his client, on that proposition, wouldn't pay him the money. Then I told Mr. Nicholls "If that is the case, we can't do any business, because the only purpose I have in selling this property is because I need the money at the present time, and that is all there is to it." We went on and talked a little while along that line, and I asked him if he could suggest anything that I could do that would induce his client to take the matter up and give me my money, and he said he didn't know of anything. And finally I suggested this to him: "Now, if your client has any doubts as to whether or not I am the owner of this property, I think I can satisfy him that I really am, and he is protected by this bond as to the delivery, and I can show him that I am able and can do it when I have complied with these certain things, and I will get a statement from the secretary of the Snow Storm Company, over the seal and signature of the company, that the books show me to be the owner of this stock, and that they will issue the same to me in sixty days, and I will then be in a position to deliver the stock." And he says: "I will tell you what I will do; I will see my client and present the matter to him, and you come in later on." So I went out and had an appointment with him along in the afternoon—I couldn't name the exact hour, but probably about two o'clock—and I came in again, and Mr. Nicholls told me he had seen his client, and his client

(Testimony of Andrew Johnson.)

was satisfied to do business on that basis; and so I says: "All right; that settles it." And so I left the bond with him there, and I went down home with the understanding that when I got home I was to write and get this statement from the Snow Storm Company; and I done so. I wrote to the company and asked them for this statement, and got it in due course of time, and forwarded it to Mr. Nicholls, and Mr. Nicholls, when he got the letter, instead of sending me my check, as I expected, came back with a counter proposition, which I refused to accede to.

The COURT.—Was that counter proposition by letter?

A. Yes, sir.

Mr. VOORHEES.—What letter have you reference to?

A. I don't know the date of it now. He wrote me to the effect that his client wasn't yet satisfied, that he wanted me to give a bond to the Snow Storm company immediately.

Mr. VOORHEES.—I think that is all.

Cross-examination.

(By Mr. HINDMAN.)

Q. As I understand from you, Mr. Johnson, when you were in Spokane that last time you are speaking of, you agreed to write to the Snow Storm company and get a statement from them.

A. Yes, sir.

Q. And you wrote to the Snow Storm company to get a statement? A. I did.

(Testimony of Andrew Johnson.)

Q. And the kind of statement you agreed to get from Mr. Nicholls, that is what you asked for in your letter to the Snow Storm company?

A. Why, virtually so, yes.

Q. "Now, he wants a statement from you that I own this stock and that you will issue this certificate as soon as I have complied with the law in the case." That is what you agreed to at that time?

A. Yes, sir.

Q. And when you got that certificate he was then to pay you the money? A. Yes, sir.

Q. Now, in March 2, 1906, you wrote to Mr. Nicholls: "This money is not mine until I can deliver the stock to you." What do you mean by that Mr. Johnson?

A. What I meant by that was that the transaction was off entirely, and whatever rights there might be involved in it, which I, not being of a judicial mind or a lawyer, I wasn't able to say, and so I left that open. I was certain the money couldn't belong to me, because I couldn't deliver the stock.

Q. In other words, you were not in position to deliver the stock without giving a bond?

A. No, he had the stock.

Q. You said: "I received your letter today with draft for $397.50, which I herewith return to you. No matter how this difficulty is settled between you and I, this money is not mine until I can deliver the stock to you." Why couldn't you deliver the stock?

A. Because he had it already. You asked me what I meant by that. I meant that the whole thing

(Testimony of Andrew Johnson.)

was in controversy, and there was only one point that I was absolutely certain of, and that was that the money wasn't mine.

Mr. HINDMAN.—That is all.

Redirect Examination.

(By Mr. VOORHEES.)

Q. What was said between you and Mr. Nicholls as to who should take the steps which were necessary to be taken to procure the issuance of a new certificate in lieu of the lost certificate?

A. I was to take the steps.

Q. Now, in connection with the letter of March 2d, I ask you what connection the thought expressed there had with the thought expressed in the concluding portion of your letter of February 27th, to Mr. Nicholls.

Mr. HINDMAN.—I object to it as incompetent, irrelevant and immaterial.

Mr. VOORHEES.—These letters have got to be considered together. It is a part of the same correspondence, if your Honor please. My contention is that that letter of February 27th indicates precisely what he said in his letter of March 2d.

The COURT.—The question is whether this witness should construe these letters or whether the Court should construe them.

Mr. VOORHEES.—Well, if your Honor pleases, counsel has asked him what he meant in one letter, and I am trying to find out what he does mean.

The COURT.—The Court now considers that testimony incompetent. The Court can give no weight to testimony of that kind.

(Witness excused.)

[Certificates to Testimony.]

I, C. W. McClain, do hereby certify that I was present at and took the testimony in the trial of the above case, and that the above and foregoing is a true and correct transcript of all the testimony so taken by me in the trial of said cause.

Dated April 19, 1909.

C. W. McCLAIN.

The foregoing correctly sets forth and represents the testimony taken in open Court at the hearing of said cause, and said cause was fully submitted upon said testimony together with the exhibits therein referred to and a stipulation of facts filed November 12, 1908, supplemented by a further stipulation filed May 22, 1909.

Dec. 27, 1909.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed April 20, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 405—IN EQUITY.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Opinion.

Messrs. VOORHEES & VOORHEES, Solicitors for Complainant.

Messrs. HAPPY & HINDMAN, Solicitors for Defendant, Snow Storm Mining Company, and Intervenor.

DIETRICH, District Judge:

I shall not attempt to review all of the points discussed in the elaborate oral arguments and voluminous briefs submitted upon behalf of the parties hereto. As is not infrequently the case, the difficulty lies not so much in defining the general principles of law as in applying them to the peculiar facts of the case.

Upon his pleadings, it was considered that the intervenor's position was fortified by the fact that he holds a certificate for the stock which is now in con-

troversy; under the evidence, a different view is entertained. The delivery of the certificate was made at such a time and under such circumstances that no one of the parties should be profited or prejudiced thereby.

The defendant has no defense of its own. In delivering the certificate to the intervenor, it acted at its peril. Complainant's letter of December 29, 1905, does not purport to authorize such delivery; there is no plea of estoppel, and the evidence falls far short of establishing such a defense; unless protected by the intervention, the defendant must yield to complainant's demands.

No advantage accruing to the intervenor from his possession of the certificate, he stands before the court in the attitude of a petitioner asking for affirmative relief. He prays that complainant be required specifically to perform an alleged agreement to sell to him the stock, and to deliver the certificate therefor. The subject matter of the contract relied upon is within the statute of frauds. To succeed, it is therefore incumbent upon the intervenor to exhibit an agreement which may be specifically enforced, and which is evidenced by a memorandum in writing signed by the complainant.

It is conceded that originally the agreement declared upon rested entirely in parol; it was merely a verbal understanding. To avoid the bar of the statute of frauds, the intervenor relies upon a written undertaking executed by complainant, pursuant to the verbal understanding, and upon letters subsequently written by him. To comply with the statute

of frauds, it is not essential that there be a formal written contract. Any written memoranda, signed by the party to be charged, and expressing the substantial terms of the agreement, will suffice. The agreement may be satisfactorily evidenced by correspondence, and even by letters not addressed to the party benefited, but whatever be the nature of the writings, whether formal or informal, they must disclose, with reasonable certainty, all of the substantial provisions of the agreement, and must be signed by the party to be charged. Measured by these standards, should the intervenor prevail?

The writings in evidence, signed by complainant, are, the undertaking, dated December 19, 1905; a letter to intervenor, dated December 20, 1905; a letter to the secretary of the defendant corporation, dated December 29, 1905; a letter to intervenor, dated January 4, 1906; a letter to intervenor, dated February 27, 1906; and a letter to intervenor, dated March 2, 1906.

From these it is clear that, conditionally or absolutely, the complainant, in December, 1905, agreed to sell to the intervenor, for twenty-six and one-half (26½) cents per share, fifteen hundred (1500) shares of the capital stock of the defendant corporation: The description of the property and the price to be paid therefor are unequivocally stated. If there were no further disclosures, little difficulty would be experienced; for, by implication of law, it should be held that the sale was absolute, delivery and payment to be made concurrently and within a reasonable time. But by the intervenor's plead-

ings, and also by the correspondence, a different case is exhibited; other conditions were involved which were material considerations of the contract. Complainant's certificate of stock had been lost or destroyed, and he could not make immediate delivery. But, for some reason not fully disclosed by the writings, he desired immediate payment; this he asserts, and this the intervenor admits (see letter Nicholls to Greenough, March 1, 1906). Upon certain conditions being complied with, immediate payment was to be made, without awaiting the delivery of the certificate of stock; this the intervenor alleges, and it is also shown by the letters both of the complainant and the intervenor. The dispute arose, and still exists, relative to these conditions. Whether we consider the writings alone or in connection with the oral testimony of the parties, the contention of the complainant appears to be the more plausible. But who is in the right need not be decided; it is enough to say that upon the point there is an irreconcilable conflict, and, to relieve courts from just such controversies, the statute of frauds was enacted, by which parties are required to put their agreements in writing. If, as we must do, we here resort only to the written memoranda signed by the complainant, it was the intervenor's duty to make payment upon the receipt of the indemnity bond and the certificate or letter from the defendant corporation, dated January 2, 1906, and transmitted to the intervenor by complainant on January 4, 1906. This he declined to do. From the writings it is fairly inferable that one of

the considerations inducing complainant to enter into the agreement to sell was his immediate and pressing need for funds; his testimony, which is thought to be admissible for this purpose, clearly supports that view. The property in question is of a peculiar character, its market value being subject to sudden and radical fluctuations. It is thought that in enforcing contracts relating to the transfer of such property, the parties should, as a rule, be held to strict compliance. Moreover, if the agreement is to be gathered from complainant's writings alone, and if, therefore, the only contract disclosed calls for payment early in January, the intervenor never has performed or tendered full performance. In the latter part of February, 1906, he proffered payment of the purchase price, but without interest from the time it became due.

Furthermore, aside from the bar of the statute of frauds, there is no feature of the case which strongly appeals for specific enforcement. It is to be observed that the intervenor paid nothing on account of the purchase price, and he in no wise suffers except in the loss of such profits as have accrued or may accrue from the advance in the price of the stock. If he has a valid contract, he may maintain an action at law for damages on account of the breach thereof. It is not the general rule specifically to enforce contracts relating to personal property. There are exceptions, and in passing upon objections to the intervenor's pleadings, it was thought that, upon the showing there made, the intervenor was within, although barely within, one

of these exceptions. The evidence does not disclose a transaction so well-defined and free from doubt as that set forth in the intervenor's complaint. It is elementary that whether specific performance shall be decreed in any case depends upon the circumstances of that case, and rests in the discretion of the court, such discretion to be exercised, not arbitrarily or capriciously, but in accordance with well settled principles of equity. As a general rule, an agreement which may be specifically enforced should be plain and certain in its terms, and the obligations thereof should be fair and mutual, and the party seeking the extraordinary relief should himself be free from fault.

It has been suggested that complainant's refusal to proceed was due, in part, to a rise in the market price of the stock; not unlikely this was true. But suppose that the price had fallen, prior to February 20, 1906, could the intervenor have been compelled to proceed with the purchase? Could he not, with much reason, have contended that there had been no absolute sale, but only a conditional agreement for a sale, and that complainant had failed to fulfill? The binding obligation of contracts which are susceptible of specific performance should be mutual, and when property of uncertain and variable value, like that of mining stock, is involved, there is every reason for throwing about the parties the protection of the statute of frauds.

It is earnestly urged by the intervenor that the transaction between him and the complainant was one of sale, and not merely an agreement to sell,

and that the title to the stock therefore passed to him. For this contention, reliance is had chiefly upon a letter of complainant to the Snow Storm Mining Company of December 29th, in which he said: "I have sold this stock and have given bond to the purchaser to deliver the same in sixty days." In the light of the other correspondence and of all of the circumstances, it is not thought that the title passed, but if the contrary be assumed, the conclusions reached by the intervenor do not necessarily follow. Even upon that theory, the contract was in part executory. The purchase price was to be paid by the intervenor, and in the meantime the complainant was to do certain things, and ultimately he was to secure a transfer of the stock upon the books of the company and to deliver the certificate therefor. It is not contended that the complainant was to complete the transfer by furnishing the certificate of stock until he was paid in full. It cannot therefore be said that the vendee (the intervenor here) had the right directly to obtain from the corporation the certificate of stock without first duly and fully complying with all of the conditions upon his part to be performed. If the contract had been in writing, and if the intervenor had in due time fully complied therewith, and if he had waived that part of the contract requiring the complainant to procure and deliver to him the certificate, and he himself had procured such delivery directly from the company, as appears to be the case made by the complaint in intervention, then his possession of the certificate should be protected and his right thereto

confirmed. But such is not the showing made by the evidence, whether the writings be considered alone or together with the oral testimony. The testimony offered by the intervenor himself is to the effect that complainant was to procure from the secretary of the mining company "a statement that he was the owner of fifteen hundred shares of the company stock, and that a certificate would be issued to him or his order at the end of seventy days," and that he, the intervenor, "agreed to pay the purchase price for the stock upon the receipt of such statement from the secretary of the company," and a bond in the sum of $500 to indemnify him in case the certificate of stock was not delivered within seventy days. These conditions were substantially complied with by the complainant, but the intervenor failed thereupon to make payment. If resort be had to the testimony of the complainant, which, in part, is undisputed, it will appear that the minds of the parties never did fully meet upon the terms of the sale. The complainant, in substance, testified that the first proposition was that he should be paid the purchase price upon furnishing a bond. The intervenor, however, declined to purchase upon that condition, stating "that he was unable to get his client to come through." Thereupon the complainant proposed that he would get a statement from the secretary of the company to the effect that, upon the face of the books of the company, complainant appeared to be the owner of the stock, and that a new certificate would issue upon compliance by complainant with the by-laws. Apparently this

was satisfactory to the intervenor, but, after receiving the statement, he imposed another condition which had not theretofore been mentioned, requiring complainant to furnish a bond to the mining company. This the complainant declined to do. While oral testimony cannot be received for the purpose of establishing the substantive terms of the agreement, if there was an agreement, it is admissible for the purpose of showing the conditions and circumstances under which the writings relied upon were executed and delivered into the hands of the intervenor; and also for the purpose of showing that they were not accepted, or that their terms were never complied with by the intervenor, or that they were abandoned by all parties.

It is concluded that the intervenor's certificate should be canceled, and that the complainant should recover from the defendant in accordance with the prayer of his complaint. All objections to the introduction of evidence are overruled.

Dated April 20, 1909.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed April 20, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial District.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Intervenor and Defendant.

Stipulation [Re Memorandum of Costs and Disbursements].

It is hereby stipulated and agreed, by and between Voorhees & Voorhees, solicitors for the above-named complainant, and Happy & Hindman, solicitors for the above-named corporation defendant and for the above-named intervenor and defendant W. A. Nicholls, that the memorandum of costs and disbursements, filed by the complainant in the above-entitled cause, contains an accurate statement of the amount of costs and disbursements to be taxed in said cause, and that in taxing the costs and disbursements in said cause, the clerk of said court shall

tax the same in the sum of $78.25 as shown in said memorandum of costs and disbursements.

VOORHEES & VOORHEES,
Solicitors for Complainant.

HAPPY & HINDMAN,
Solicitors for Defendant Snow Storm Mining Company and Intervenor and Defendant W. A. Nicholls.

[Endorsed]: Filed May 19, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,
Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),
Defendant,

and

W. A. NICHOLLS,
Intervenor and Defendant.

Stipulation [Re Decree].

Whereas the parties hereto heretofore stipulated that if the Court, upon the trial of the above-entitled cause, should, upon the evidence, find for the complainant, the judgment and decree herein, should provide for the payment, by the said defendant corporation, to the complainant, of the sum of four hundred

and ninety-five dollars ($495.00), on account of divers and sundry dividends paid, by the said defendant corporation, on the fifteen hundred (1500) shares of corporate stock mentioned and described in the bill of complaint, filed herein, to and including the 12th day of November, 1908, the date of the filing of such stipulation in said cause, and,

Whereas, since the said 12th day of November, 1908, and to and including the 1st day of May, 1909, the said defendant corporation has paid, on said fifteen hundred (1500) shares, divers and sundry dividends aggregating the sum of one hundred and ninety-five dollars ($195.00);

It is now stipulated and agreed, by and between Voorhees & Voorhees, solicitors for the complainant, and Happy & Hindman, solicitors for the defendant corporation, Snow Storm Mining Company and for W. A. Nicholls, the defendant and intervenor, that the judgment and decree, which the Court, upon the trial of said cause, has indicated shall be entered, herein, in favor of the complainant, shall provide for the payment, by said defendant corporation, to the complainant, of the sum of six hundred and ninety dollars ($690.00), for and on account of dividends that have accrued and become payable, upon the said fifteen hundred (1500) shares of corporate stock, from the 28th day of November, 1904, to the 1st day of May, 1909.

VOORHEES & VOORHEES,
Solicitors for Complainant.

HAPPY & HINDMAN,
Solicitors for Defendant Corporation and for Defendant and Intervenor.

[Endorsed]: Filed May 22d, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Intervenor and Defendant.

Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

That the complainant, Andrew Johnson, now is, and at and during all the times since the 28th day of November, 1904, has been, the owner of, and entitled to, fifteen hundred (1500) shares of the capital stock of the defendant corporation, Snow Storm Mining Company.

That the defendant corporation, Snow Storm Mining Company, upon the delivery to it of a copy of this decree certified by the clerk of this court, make, issue and execute, to the complainant, Andrew John-

son, a paper writing or certificate, in due form stating and setting forth that Andrew Johnson is the owner of, and entitled to, fifteen hundred (1500) shares of the capital stock of the Snow Storm Mining Company, and that said certificate so issued, as aforesaid, shall be in lieu of, and stand in the place of, certificate numbered ten hundred and sixty-two (1062) for fifteen hundred (1500) shares of said capital stock, heretofore, and prior to the 28th day of November, 1904, made, issued and executed, by the defendant corporation, Snow Storm Mining Company, to the complainant, Andrew Johnson, and, on the 28th day of November, 1904, destroyed by fire.

And it is further ordered, adjudged and decreed, that the intervenor and defendant, W. A. Nicholls, has no right, title or interest in or to the said fifteen hundred (1500) shares of the said capital stock, or in or to any part thereof, and that the certificate for fifteen hundred (1500) shares of the capital stock of the defendant corporation, Snow Storm Mining Company, mentioned in the proceedings herein, issued by the said company, to the intervenor and defendant, W. A. Nicholls, dated the 26th day of February, 1905, and numbered seventeen hundred and five (1705), be, and the same is, hereby declared and taken to be utterly null and void to all intents and purposes, so far as the same may interfere with, or in any manner affect, the right, title and interest of the complainant, in and to the said fifteen hundred (1500) shares of the said capital stock, as the owner thereof, and that the defendant corpora-

tion, Snow Storm Mining Company, do, forthwith, upon the receipt of a copy of this decree, certified by the clerk of this court, cancel, upon the books of said company, the said certificate numbered seventeen hundred and five (1705).

And it is further ordered, adjudged and decreed, that the defendant corporation, Snow Storm Mining Company, account for and pay, unto the complainant, Andrew Johnson, the sum of six hundred and ninety dollars ($690.00), for and on account of dividends that have accrued and become payable, upon the said fifteen hundred (1500) shares of the said capital stock, from the 28th day of November, 1904, to the 1st day of May, 1909.

And it is further ordered, adjudged and decreed, that the defendant corporation, Snow Storm Mining Company, and the intervenor and defendant, W. A. Nicholls, pay all the costs of this cause for which an execution will issue.

Done in open court the 22d day of May, 1909.

FRANK S. DIETRICH,
District Judge.

Costs entered as per stipulation on file, $95.35.

[Endorsed]: Filed May 22, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States, in and for the District of Idaho, Northern Division, Ninth Judicial Circuit.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Intervenor and Defendant.

Stipulation [Filed May 24, 1909, Re Taxation of Costs].

It is hereby stipulated and agreed, by and between Voorhees & Voorhees, solicitors for the complainant, above named, and Happy & Hindman, solicitors for the corporation defendant and for the intervenor and defendant, W. A. Nicholls, that, in taxing the costs and disbursements in said cause, the clerk of said court shall tax the sum of $17.10 in addition to the sum of $78.25 provided to be taxed by the stipulation of the said parties filed herein on the 19th day of May, 1909.

VOORHEES & VOORHEES,
Solicitors for Complainant.

HAPPY & HINDMAN,
Solicitors for Defendant Corporation and for Defendant and Intervenor.

[Endorsed]: Filed May 24, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Assignment of Errors.

Now, after decree, on this 10th day of September, 1909, comes the defendant herein, the Snow Storm Mining Company, and W. A. Nicholls, intervenor herein, and feeling themselves aggrieved by the final order and decree of the Court rendered in this cause, bearing date the 22d day of May, 1909, and desiring to appeal from said judgment and decree, to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, makes the following assignment of errors upon which they will rely for the reversal of said judgment and decree, to wit:

1. The Circuit Court of the United States, for the District of Idaho, Northern Division, erred in holding that the intervenor, W. A. Nicholls, was not

entitled to specific performance of the contract of sale set out and mentioned in his complaint of intervention.

2. The Court erred in holding that the proofs introduced upon said trial were not sufficient to entitle the said intervenor, W. A. Nicholls, to specific performance.

3. The Court erred in holding that the agreement set out and mentioned in Intervenor W. A. Nicholl's complaint of intervention, and the proof adduced upon the trial, were within the statute of frauds.

4. The Court erred in holding that the said transactions proved upon the trial of said cause, did not constitute completed sale.

5. The Court erred in adjudging that the intervenor's certificate of stock in the Snow Storm Mining Company should be canceled.

6. The Court erred in holding that the complainant should recover from the defendants and intervenor in accordance with the prayer of his complaint.

7. The Court erred in holding that the complainant was entitled to recover the sum of Six Hundred Ninety Dollars against the defendant herein, Snow Storm Mining Company.

8. The Court erred in entering judgment against the intervenor herein, W. A. Nicholls, in canceling said certificate of stock.

9. The Court erred in entering judgment herein against the defendant Snow Storm Mining Company, herein, compelling it to surrender to the com-

plainant herein another certificate of stock in lieu of the one lost.

10. The Court erred in entering judgment against the intervenor herein, W. A. Nicholls, in canceling said certificate held by him.

11. The Court erred in entering judgment against the defendant herein, Snow Storm Mining Company, for costs of this suit.

Wherefore, the said defendant herein, Snow Storm Mining Company, and intervenor herein, W. A. Nicholls, pray that the judgment of the Circuit Court of the United States for the District of Idaho, Northern Division, be reversed, with directions to said lower court to enter judgment as prayed for by intervenor herein, W. A. Nicholls.

HAPPY & HINDMAN,

Attorneys for Snow Storm Mining Company, and W. A. Nicholls, Intervenor.

Due and legal service of the within and foregoing assignment of errors is hereby admitted, this 10th day of September, 1909.

VOORHEES & VOORHEES,

Attorneys for Complainant.

[Endorsed]: Filed Sept. 13, 1909. A. L. Richardson, Clerk.

[Petition for, and Order Allowing Appeal.]

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

The Snow Storm Mining Company and W. A. Nicholls, defendants and intervenor, feeling themselves aggrieved by the final order and decree made and entered by the said Court on the 22d day of May, 1909, whereby it, among other things, adjudged that the certificate of stock held by the intervenor herein should be canceled, and that the complainant recover from the defendant in accordance with the prayer of his complaint, and the sum of ($690.00) Six Hundred Ninety Dollars, together with his costs and disbursements of the action; now come the defendants and intervenor, by their attorneys, Messrs. Happy & Hindman, and petition the Court for an order allowing this defendant and intervenor, W. A. Nicholls, to prosecute an appeal from said decree to the Honorable United States

Circuit Court of Appeals, for the Ninth Judicial Circuit, and your petitioner will ever pray.

HAPPY & HINDMAN,

Attorneys for Snow Storm Mining Company, and Intervenor, W. A. Nicholls.

Upon motion of Messrs. Happy & Hindman, attorneys for Snow Storm Mining Company, and intervenor, W. A. Nicholls, appellant herein, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from the final decree heretofore filed herein, be and the same is hereby allowed, and a certified copy of the records, exhibits, and all proceedings herein, be forthwith transmitted to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

Dated this 13th day of September, 1909.

FRANK S. DIETRICH,

Judge.

Service of the within petition to appeal is hereby acknowledged this 10th day of September, 1909, in the county of Spokane, Washington.

VOORHEES & VOORHEES,

Attorneys for Complainant.

[Endorsed]: Filed Sept. 13, 1909. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Bond on Appeal.

Know All Men by These Presents: That we, Snow Storm Mining Company and W. A. Nicholls, as principal, and The United States Fidelity & Guaranty Co., a corporation, as surety, are held and firmly bound unto the above-named plaintiff, Andrew Johnson, in the sum of Two Hundred Dollars ($200.00), to be paid to the said Andrew Johnson, for the payment of which well and truly to be made, we bind ourselves, and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of September, in the year of our Lord, one thousand nine hundred and nine.

Whereas, the above-named defendants and intervenor have prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Judi-

cial Circuit, to reverse the judgment rendered in the above-entitled suit by the Judge of the Circuit Court of the United States, in and for the District of Idaho, Northern Division:

Now, therefore, the condition of this obligation is such that if the above-named Snow Storm Mining Company and W. A. Nicholls shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SNOW STORM MINING COMPANY,
By HAPPY & HINDMAN,
Its Attorneys.
WILLIAM A. NICHOLLS,
THE UNITED STATES FIDELITY & GUARANTY CO.
[Corporate Seal] By CYRUS HAPPY,
Its Attorney in Fact.
R. L. WEBSTER,
Its Attorney in Fact.

This bond approved this 22 day of September, 1909.

FRANK S. DIETRICH,
Judge.

POWER OF ATTORNEY.

Know All Men by These Presents: That the United States Fidelity and Guaranty Company, a body corporate duly incorporated under the laws of the State of Maryland, doth hereby constitute and appoint M. B. Connelly, R. L. Webster, J. Grier Long, Cyrus Happy and W. W. Hindman of the City

of Spokane, County of Spokane and State of Washington, to be its true and lawful attorneys, in and for the Counties of Kootenai, Shoshone and Latah all in the State of Idaho, for the following purposes, to wit:

To sign its name as Surety to, and to execute, acknowledge, justify upon and deliver any and all Stipulations, Bonds and Undertakings given or required in any Judicial action or proceeding over which a United States Court shall exercise jurisdiction.

It being the intention of this Power of Attorney to fully authorize and empower any one of the said M. B. Connelly, and the said R. L. Webster and the said J. Grier Long together with either the said Cyrus Happy or the said W. W. Hindman to sign the name of said Company, and affix its corporate seal as surety to any or all of said Stipulations, Bonds and Undertakings, and thereby to lawfully bind it as fully and to all intents and purposes as if done by the duly authorized officers of said Company with the seal of the said Company thereto affixed, and the said Company hereby ratifies and confirms all and whatsoever any one of the said M. B. Connelly and the said R. L. Webster and the said J. Grier Long together with either the said Cyrus Happy or the said W. W. Hindman may lawfully do in the premises by virtue of these Presents.

In witness whereof, the said The United States Fidelity and Guaranty Company, pursuant to a Resolution of its Board of Directors, duly passed on the 11th day of January, A. D. 1904, (a certified copy of which is hereto annexed), has caused these

Presents to be sealed with its common and corporate seal, duly attested by its 3d vice-president and by its asst. secretary, this 12th day of April, A. D. 1905.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

By RICHARD D. LANG,
3d Vice-President.

W. W. SYMINGTON,
Asst. Secretary.

[Seal]

State of Maryland,
City of Baltimore,—ss.

I, A. D. Patrick, a Notary Public, duly appointed and qualified in and for the City and State aforesaid, hereby certify that on this 12th day of April A. D. 1905, personally appeared before me Rich'd D. Lang, 3d Vice-President, and W. W. Symington, Asst. Secretary of The United States Fidelity and Guaranty Company, to me personally known to be the said officers of the said Corporation and the individuals who executed the foregoing instrument, and they each duly acknowledged the execution of the same as the act and deed of the said Corporation; and being by me each duly sworn severally and each for himself, did depose and say that they are the said officers of the said Corporation, and that the seal affixed to the foregoing instrument is the corporate seal of the said Corporation, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal at the city of Baltimore the day and year above written.

[Seal] A. D. PATRICK,
Notary Public.

My commission expires the first Monday in May, A. D. 1906.

COPY OF RESOLUTION.

That whereas, it is often necessary, in order to facilitate the business of the Company in States other than Maryland and in the Territories and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to have Stipulations, Bonds and Undertakings given or required in judicial actions or proceedings, executed with the least delay and with promptness,

Now, therefore, be it resolved, that the President or one of the Vice-Presidents and the Secretary or one of the Assistant Secretaries be, and they are hereby authorized to appoint one or more persons residing in the States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland, to sign the name of the Company as Surety to and to execute, acknowledge, justify upon and deliver any and all Stipulations, Bonds and Undertakings given or required in any Judicial action or proceeding within any one of the said States or Territories, or Provinces of Canada or Colony of Newfoundland, and that the said person or persons so appointed are hereby authorized and empowered to sign the name of the Company and to

affix its corporate seal as Surety to said Stipulation, Bonds and Undertakings, and to sign their names thereto in attestation of the same, and thereby to lawfully bind the Company to all intents and purposes, as if done by its duly authorized officers, and the Company through us, its Board of Directors, hereby ratifies and confirms all and whatsoever the said person or persons may lawfully do by virtue of the authority hereby vested in them.

I, W. W. Symington, Asst. Secretary of The United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full and correct copy of a Resolution passed by the Board of Directors of the said Company at a regular meeting thereof, duly called and held on the 11th day of January, A. D. 1904, a quorum being present, as the same appears on the records of the Company now in my possession and custody as Asst. Secretary.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of Baltimore, Maryland, this 12th day of April, A. D. 1905.

[Corporate Seal] W. W. SYMINGTON,
Asst. Secretary.

[Endorsed]: No. 405. In the Circuit Court of the United States for the District of Idaho, Northern Division. Andrew Johnson, Complainant, vs. Snow Storm Mining Company et al., Defendants. Bond on Appeal. Filed Sept. 24th, 1909. A. L. Richardson, Clerk. Happy & Hindman, 18 Wolverton Block, Spokane, Washington, Attorneys for Defendants.

In the Circuit Court of the United States for the District of Idaho, Northern Division.

No. 405.

ANDREW JOHNSON,

Complainant,

vs.

SNOW STORM MINING COMPANY (a Corporation),

Defendant,

and

W. A. NICHOLLS,

Defendant and Intervenor.

Citation [Original].

The President of the United States to Andrew Johnson:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date of this citation, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, in and for the District of Idaho, Northern Division, to show cause, if any there be, why the judgment and decree in the said appeal mentioned, should not be corrected and speedy justice not be done to the said Snow Storm Mining Company and W. A. Nicholls, and to the parties to that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 24th day of September, 1909, and of the Independence of the United States, the one hundred and thirty-fourth.

FRANK S. DIETRICH,
Judge of the Circuit Court of the United States for the District of Idaho, Northern Division.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 405. (Original.) In the Circuit Court of the United States for the District of Idaho, Northern Division. Andrew Johnson, Complainant, vs. Snow Storm Mining Co. et al., Defendant. Service of the within Citation is hereby acknowledged this 4th day of October, 1909, in the county of Spokane, Washington. Voorhees & Voorhees, Attorneys for Plaintiff. Filed on return this 29th day of November, 1909. A. L. Richardson, Clerk.

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

[Certificate of Clerk U. S. Circuit Court to Record.]

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Idaho.

SNOW STORM MINING COMPANY (a Corporation),

and

W. A. NICHOLLS,

Appellants,

vs.

ANDREW JOHNSON,

Appellee.

I, A. L. Richardson, Clerk of the Circuit Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 106, inclusive, contain true and correct copies of the Complaint, Subpoena, Petition for Intervention, Order Allowing W. A. Nicholls to Intervene, Answer of Intervenor, Cross-bill of Complaint, Answer of Snow Storm Mining Company, Notice of Motion, Motion to Vacate Order Granting Leave to Intervene, Order Denying Motion to Vacate Order of Intervention, Replication to Answer of Snow Storm Mining Company, Notice of Trial of Issues of Law, Answer to Cross-bill of Complaint, Replication to Answer of Intervenor, Replication of W. A. Nicholls to Answer of Complainant, Stipulation as to Facts, Stipulation Filed Nov. 12, 1908, Exhibits, Stipulation Filed Dec. 21, 1908, Stipulation Filed Jan. 13, 1909, Testimony,

Opinion, Stipulation Filed May 19, 1909, Stipulation Filed May 22, 1909, Decree, Stipulation Filed May 24, 1909, Assignment of Errors, Petition to Appeal, Bond on Appeal, Citation, Return to Record, and Clerk's Certificate to Transcript in the above-entitled cause, which together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $63.90, and that the same has been paid by the appellants.

Witness my hand and the seal of said court affixed this 15th day of January, 1910.

[Seal] A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 1854. United States Circuit Court of Appeals for the Ninth Circuit. The Snow Storm Mining Company (a Corporation), (Defendant), and W. A. Nicholls (Intervenor), Appellants, vs. Andrew Johnson (Complainant), Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Idaho, Northern Division.

Filed May 6, 1910.

F. D. MONCKTON,
Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SNOW STORM MINING COMPANY, a Corporation, (Defendant), and W. A. NICHOLLS, (Intervenor),

Appellants,

vs.

ANDREW JOHNSON (Complainant),

Appellee.

Brief of Appellants.

W. W. HINDMAN,
W. H. WINFREE,
CYRUS HAPPY,
Attorneys for Appellants,
Spokane, Wash.

COLE PRINTING COMPANY

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SNOW STORM MINING COMPANY, a Corporation, (Defendant), and W. A. NICHOLLS, (Intervenor),

Appellants,

vs.

ANDREW JOHNSON (Complainant),

Appellee.

Brief of Appellants.

W. W. HINDMAN,
W. H. WINFREE,
CYRUS HAPPY,
Attorneys for Appellants,
Spokane, Wash.

COLF PRINTING COMPANY

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE SNOW STORM MINING COMPANY, a Corporation, (Defendant), and W. A. NICHOLLS, (Intervenor),

Appellants,

vs.

ANDREW JOHNSON (Complainant),

Appellee.

Brief of Appellants.

Appellee filed his bill alleging that he was the owner of fifteen hundred shares of the capital stock of the appellant corporation, which certificate had been destroyed by fire; that he had complied with all the requirements of the corporation, which it had prescribed for the re-issuance of lost or destroyed certificates; but notwithstanding this, the corporation refused to issue a new certificate; that the corporation had paid dividends on this stock to other persons unknown to the complainant. Appellee prayed that the corporation be commanded to issue a new certificate and account to him for

the dividends so wrongfully paid. Appellant Nicholls, by leave of Court, filed his petition in intervention and thereafter answered and filed a cross bill. He set forth that about December 19, 1906, this appellee sold him 1500 shares of stock mentioned in the complaint at the price of 26½ cents per share, and agreed in view of the fact that the certificate was destroyed that he (appellee) would do all things necessary to procure from the corporation a statement that it would issue a new certificate; that payment for said stock should be made upon the procuring of such statement of the delivery of a new certificate. It is further alleged that appellee failed to carry out his agreement in that he refused to execute an indemnity bond as required by the by-laws of the corporation as a condition precedent to the issuance of a new certificate. The appellant Nicholls himself indemnified the corporation and thereupon there was issued to him a new certificate; that appellant Nicholls thereafter waiving the default of appellee, tendered him the agreed amount of the purchase price of the stock, which tender was refused, but has since been kept good.

It is further alleged that the value of this stock had no regular price; that it fluctuates daily and its value at any given time could not be easily estimated. The corporation answered admitting that there stood in the name of the appellee upon its books 1500 shares of stock. It denied that full compliance was had by appellee; that the terms prescribed by its by-laws entitled him to the issuance of a new certificate and admitted that it refused to issue such certificate.

From the evidence it appears that on or before

November 28, 1904, appellee was the owner of a certificate of stock for 1500 shares of the appellant corporation, duly issued by the proper officers thereof, and which certificate had been destroyed by fire at the city of Colfax, Washington, on the date last named. (Tr., 44.) The by-laws of the company prescribe that any person claiming to have lost a certificate might have a new one issued by producing evidence of having given notice of his loss for sixty days in certain designated newspaper, and filing with the secretary of the company his affidavit setting forth the facts and circumstances of the loss, and executing a bond of indemnity in an amount to be prescribed by the company. (Tr., 45.)

Appellee testified on December 19, 1906, he held a telephone conversation with appellant Nicholls in which he stated that he had lost the certificate and was unable, therefore, to deliver the same, and asked if there was any way in which sale could be arranged then with delivery of the stock later on. Nicholls replied that he thought such an arrangement could be made and suggested that a bond in the sum of $500.00 be given to insure delivery in seventy days. (Tr., 85.) On the following day appellee wrote to appellant Nicholls as follows:

> "As per our talk over phone yesterday, I send you a Bond in the sum of Five Hundred Dollars to secure delivery of 1500 shares of Snow Storm Stock in seventy days. I prefer that the Bond be given to you in person rather than some stranger if you can arrange it that way. I can deliver in that time but suppose a contingency such as delay in mail or neglect of the officers of the company to do their duty and I should be delayed a few days I know that

you would not take advantage of that and stick me for $500.00. However, I leave it to your own good judgment."

The bond referred to in this letter was enclosed therein. It was executed by appellee and two sureties in favor of appellant Nicholls, conditions as follows:

"The condition of this obligation is such, that whereas, said Andrew Johnson claims to be the owner of Fifteen Hundred shares of the capital stock of the Snow Storm Mining Company of Mullan, Idaho, now, in consideration of the payment of the sum of Three Hundred Ninety-seven and 50-100 Dollars to the said Andrew Johnson by the said ....., we, the undersigned, hereby agree to furnish to the said....., within seventy days from date hereof, a certificate of stock for 1500 shares of the capital stock of the said Snow Storm Mining Company; now, if the said Andrew Johnson shall well and truly furnish the said 1500 shares of the capital stock of the said Snow Storm Mining Company to the said ..... within the time herein specified, then this obligation is to be void and of no effect; otherwise to remain and be in full force and virtue."

On December 29, 1906, appellee wrote to the secretary of the defendant corporation as follows:

"I send you under separate cover copy of the 'Colfax Gazette' in which is a notice that explains itself. A similar notice running in your Mullan paper. These notices will continue for sixty days.

You will greatly favor me if you will send me a statement over the seal and signature of the Snow Storm Co. to the effect that I am the owner of 1500 shares of Snow Storm stock and that a certificate of same will be issued to me soon as these notices have run the agreed length of time,—sixty days.

I have sold this stock and have given a bond to

> the purchaser to deliver same in sixty days. Now he wants a statement from you that I own this stock and that you will issue this certificate soon as I have complied with the law in the case. Please let me hear from you as soon as possible."

The secretary of the defendant corporation on January 2, 1905, replied as follows:

> "Replying to yours of December 29th, will say that after examining our records we find that you are the holder of 1500 shares of Snow Storm stock, and will, after notices have run 60 days, and upon receipt of your affidavit stating the facts and circumstances as near as possible, together with bond for one year of indemnity to the company of 25c per share ($375.00) properly executed, issue to you a new certificate for 1500 shares."

On January 4, 1906, appellee wrote to appellant Nicholls thus:

> "I enclose you letter from the Secretary of the Snow Storm Co. that I think ought to satisfy your client the notices are now running in papers at Mullan and Colfax."

ASSIGNMENTS OF ERROR.

1. The lower Court erred in admitting oral testimony to show that the contract of sale was not fully agreed upon in writing.

2. The lower Court erred in entering judgment for the plaintiff, Andrew Johnson.

It is conceded that the oral agreement made by these parties over the telephone is obnoxious to the statutes of

frauds, but we confidently urge that the letters above reproduced make a complete and perfect contract. As stated by the learned judge below, it is not necessary that there be a formal written contract to comply with the statute of frauds. Any written memoranda signed by the party to be charged and expressing the substantial terms of the agreement will suffice. The agreement may be satisfactorily evidenced by correspondence and advice by letters not addressed to a party benefited.

Looking, therefore, alone to these writings as we must, we find that the bond furnished by appellee provides that, for the consideration of $397.50 he agreed to deliver within seventy days 1500 shares of the capital stock of the appellant corporation. This makes a complete contract of sale. The subject of the sale was fixed with absolute certainty, as well as the price, and the time within which delivery should be made; that the appellee believes that an absolute sale had been made is conclusively shown by his letter to the secretary of the corporation written a few days later wherein he states, "I have sold this stock and have given a bond to the purchaser to deliver the same in sixty days."

It is true no time is expressly fixed at which payment should be made unless the court could accept the oral testimony of appellee, but this, of course, is inadmissible and incompetent. What inference then does the law draw when a contract is made which definitely fixes the subject mattef of the sale, the consideration thereof, and the time of delivery of the articles sold with no specific reference to the time of payment? The only legitimate

conclusion to be drawn is that payment should be contemporaneous with the delivery of the stock. In other words, the appellee Nicholls was bound at any time within the time fixed in the bond to pay the agreed consideration upon delivery to him of the stock. The contract was an executed sale.

This is not a case to be assimilated to those in which it is held that the property was not changed because something remained to be done by the seller to the article sold. The rule is that under a parol sale of goods there is no change of property if any act remains to be done by the seller to place the thing sold in condition for delivery; as, for example, to ascertain the proper article, to set apart the specific goods out of a quantity of similar kind, or to determine the quantity by measurement. There could be no change of property until these acts were done. The language used by the appellee was, "I have sold this stock and have given a bond to the purchaser to deliver the same in sixty days." These words imply nothing executory, but something executed. As stated by the Supreme Court in Beardsley v. Beardsley, 138 U. S. 262, at page 267:

> "It is not that the vendor will sell, but has sold. Not that the title remains in the vendor, yet to be transferred, but that it already has been transferred. The ownership, equitable if not legal, is in the vendee. It is not that the stock belongs to the vendee, upon payment, as appeared in the case of French v. Hay, 22 Wall. 231, but that it is now his, subject to a lien. Its meaning is, therefore, that of a sale, with retention of the legal title as security for purchase money. It is an equitable mortgage, and the rights created and assumed by it are like those cre-

ated and assumed when the owner of real estate conveys by deed to a purchaser, and takes back a mortgage as security for the unpaid purchase money. Under those circumstances action is the duty of the vendor and mortgagee, and delay imperils no right of the purchaser and mortgagor. We have little doubt as to the significance of this contract, and hold that its effect was to make the appellee one-third owner with the appellant of the stock of the railroad company. Such, obviously, is the import, and therefore, such must be adjudged the intention of the parties by this contract. With this construction of the instrument, it is unnecessary to consider the various suggestions made by counsel for appellant upon the theory that the contract was purely executory, a mere contract to sell. Taking it as an executed contract, one by which the ownership passed to the appellee, with a reservation of title simply as security for the purchase money—in other words, an equitable mortgage—we pass to the second and most difficult matter in the case."

Delivery is not essential to pass title as between the parties to a contract unless it is specifically required by the terms of the agreement. The contract becomes absolute as soon as the bargain and sale agreement is reached without actual payment or delivery. The property then vests in the vendee, and the risk of accident enures thenceforth in him. If by an act of God delivery becomes impossible the loss is visited upon the vendee and is not suffered by the vendor.

In the case of Crill v. Doyle, 53 Cal. 714, a bill of sale was made by Crill in his lifetime to Whiting, reciting that Crill had that day sold to Whiting all the right, title and interest or claim of Crill to the cattle. The cattle were then in the possession of the defendant under contract for their pasturage. The court said:

> "The sale by Crill transferred the title to the cattle to Whiting, and was valid as between them, although no money was actually paid, and no formal credit was given for the agreed price upon the debt due from Crill to Whiting. The finding, therefore, that Crill, at the time of his death, was the owner of the cattle, was not sustained by the evidence."

Again, as said in the case of Webber v. Davis, 69 Am. Dec. 88 (Maine):

> "The title will pass by a sale without delivery from the true owner, though at the time of the sale the goods are in the tortious possession of a third person: And a sale without delivery is valid as against the vendor."

The appellee by writing to the corporation and stating that he had sold the stock to Nicholls estopped himself from ever demanding the issuance of a new certificate to him. Upon his statement the corporation had a right to rely, especially when such statement was fortified by a letter from Nicholls confirming the appellee's statement that the stock had been sold. (Tr., 54.)

The records show that on February 25, 1906, the corporation issued a new certificate to Mr. Nicholls upon condition that he would write a personal letter guaranteeing it against loss. (Tr., 55.) This was done. In so doing the corporation waived certain of the provisions of its by-laws herein before quoted. This it had a right to do as such by-laws were plainly for its own benefit. The appellee knew the provisions of the by-laws with reference to an indemnifying bond, but neglected to give one to the corporation personally as he prefers to furnish a bond to Mr. Nicholls. (Tr., 48.) Contending, as

we do, that the same was an executed one, and admitting for the purpose of the argument that it was agreed that Nicholls should pay for the stock upon the procurement by appellee of a statement from the corporation, the result is, nevertheless, that as it was not of the essence of the contract, failure to pay at the time fixed did not rescind the contract, and no demand for payment having been made upon him by appellee, and no tender of the certificate being made within the time fixed and no rescision of the contract having been indicated to appellant Nicholls, he never was in default.

It will be contended by the appellant that the subsequent correspondence of the parties show that it was agreed that payment should be made immediately upon the procurement of a letter from the secretary of the corporation stating that the stock would be delivered within seventy days. It is our contention that a full and complete contract was made in the letter and bond accompanying it from the appellee to Nicholls, and that this contract was in no manner modified. It is, of course, true that the appellee could not modify his contract by any provisions made by him, or any communications contained in these letters, not consented to by the appellant Nicholls.

Schuchardt v. Allans, 1 Wall. 359-362.
C. & C. Electric Co. v. Frisby, 33 At. 604.
Turney v. McCormick, 49 S. E. 32.

Our contentions summarized are: That the letter and bond referred to make a complete contract which is not

affected by the statute of frauds; that the sale was an executed one in which title passed immediately to the appellant Nicholls, and that therefore the latter is entitled to the relief sought by him in his cross bill.

We, therefore, respectfully urge that the judgment of the lower court should be reversed accordingly.

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IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

THE SNOW STORM MINING COMPANY (a corporation), (Defendant), and W. A. NICHOLLS (Intervenor), *Appellants,*

vs.

ANDREW JOHNSON (Complainant), *Appellee.*

No. 1854.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION.

BRIEF FOR APPELLEE

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STATEMENT.

The Snow Storm Mining Company, one of the appellants, is an Idaho corporation, and the intervenor and appellant was a citizen of the state of Washington, and residing in the city of Spokane, and the appellee was a resident of the state of Washington.

On November 28, 1904, Johnson, the appellee, was the owner of 1500 shares of stock of said Mining Company, which stock stood in his name on the books of said Company (Record, p. 41). On November 28, 1904, the certificate of stock issued to appellee for said 1500 shares was destroyed by fire (Record, p. 44).

On December 19, 1905, the appellee entered into an oral contract with the intervenor to sell to the latter said 1500 shares of stock for 26 1-2 cents per share, the purchase price to be paid when the vendor delivered to the vendee a bond in the sum of $500.00 to insure delivery of the stock in the time it would require, under the rules of the Mining Company, to procure the issuance of a new certificate in lieu of the one destroyed (Record, pp. 48, 56, 81, 85, 87, 88). The bond provided for in said oral agreement was mailed by appellee to intervenor at Spokane, and on the next day appellee went to Spokane and called on intervenor to receive the money for the stock (Record, pp. 87, 88). At this meeting intervenor stated he did not understand by the oral agreement entered into over the telephone that he was to pay the money immediately upon receipt of the bond, and thereupon a new oral contract was entered into which provided that said bond should be left with intervenor and that appellee should procure and forward to intervenor a statement of the Mining Company to the effect that appellee was the owner of said 1500 shares of stock, and that a certificate for the same would be issued to him as soon as he had complied with the

law governing such matters, and that upon receipt of such statement intervenor should pay for the stock. (Record, pp. 22, 56, 80, 81, 88.)

January 2, 1905, appellee procured and forwarded such statement to the intervenor (Record, pp. 52, 53). The intervenor refused payment upon receipt of such statement, insisting that one of the conditions of the contract was that appellee was also to furnish an indemnity bond to the Mining Company as a condition precedent to payment by intervenor (Record, pp. 58, 89).

That the agreement was as stated and understood by appellee, see testimony of appellee (Record, pp. 88, 89); admission of intervenor in his letter of March 1, 1906, to the Mining Company (Record, p. 60); admission of intervenor in his cross bill of complaint (Record, pp. 12, 13).

On February 26, 1906, said Mining Company issued said certificate of stock direct to intervenor (Record, p. 55), and, upon receipt of said stock, intervenor tendered to appellee the agreed price of 26 1-2 cents per share, which tender appellee refused and, on the same day that he refused said said tender, he wrote the intervenor that he had refused said tender and that the trade was off by reason of intervenor's failure to pay the agreed price of 26 1-2 cents per share for the stock upon receipt of the bond to intervenor and the statement of the Mining Company that he, appellee, was the owner thereof (Record, pp. 58, 59).

Thereafter, and on June 17, 1907, the appellee wrote the Mining Company (Record, pp. 63, 64), submitting proof of loss of certificate of stock and proof of publication of loss of certificate, and requested the Mining Company to fix the amount of indemnity bond required by the by-laws of the Company, in order to secure the issuance to him of a new certificate. To this letter the Mining Company replied under date of July 13, 1907, refusing to fix the amount of bond, and stating that duplicate certificate would not be issued to appellee. (Record, p. 65.)

Thereupon, appellee instituted the above entitled suit against the Snow Storm Mining Company to procure the issuance to him of a new certificate in lieu of the one destroyed and for accrued dividends and for costs of suit. The intervenor filed his petition in intervention and his answer and cross complaint. In his cross bill the intervenor prays for specific performance of the contract for the sale of said mining stock set up in said cross complaint.

Appellants prosecute this appeal from the decree of the lower court cancelling the certificate of stock issued by the Mining Company to the intervenor, and directing the Mining Company to issue to appellee a certificate of stock for 1500 shares in lieu of the one destroyed, and decreeing that the Mining Company pay to appellee the sum of $690.00 accrued dividends, and that the Mining Company and the intervenor pay the costs of suit.

BRIEF.

THE CONTRACT RELIED UPON IS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS BECAUSE IT DOES NOT CONTAIN ALL OF ITS ESSENTIAL TERMS IN WRITING.

Appellants have considered only two assignments of error in their brief. We give attention to the first one, which is as follows:

"The lower court erred in admitting oral testimony to show that the contract of sale was not fully agreed upon in writing."

This assignment is not found in the record among the assignments of error taken on behalf of appellants, and this complaint on the part of the appellants, that the court erred in admtting oral testimony to show that the contract was not in writing, is quite curious, in view of the state of the record. Most of the record showing that a large part of the contract was oral, was voluntarily put in by the *appellants* and consists of the cross complaint and other pleadings of the intervenor (Record, pp. 22, 12), his own testimony offered on his behalf (Record, p. 81) and intervenor's letters to W. D. Greenough and to appellee (Record, pp. 56, 60). It would seem quite certain that the appellants cannot complain of the court considering the admissions in their

pleadings, nor can they complain, especially the intervenor, of the court's considering intervenor's own testimony voluntarily offered on his behalf (Record, p. 81). It is further the fact, so far as this complaint of error in the admission of testimony is concerned, that no objection was made to the testimony of Andrew Johnson, the appellee, and no exception taken on behalf of appellants to any ruling upon that testimony (Record, pp. 84-92). Where the *grounds* of objection are not stated an objection will not be considered on appeal. Certainly the appellate court will not consider an objection where it was not taken at all.

Toplitz v. Hedden, 146 U. S. 250.
Camden v. Doremus, 3 How. 530.
1 *Thompson on Trials,* Secs. 690, 693, 694.

Amongst the substantial terms of the contract upon which the intervenor relied in his cross bill (Record, p. 20), are the following, which are not contained in any writing signed by the party to be charged, to-wit, the appellee:

1. The agreement of Andrew Johnson to procure a statement from the Snow Storm Mining Company.

2. The agreement of Andrew Johnson to do all things necessary to procure from the Snow Storm Mining Company a new certificate.

3. The agreement that the purchase price of the stock should be paid by the intervenor to appellee upon the procurement of the statement from the Snow

Storm Mining Company, or upon the delivery of the new certificate.

4. And there was a further term, not pleaded, that the appellee might write the intervenor and receive back his bond and stop the trade (Letter of March 1; Record, p. 60).

Outside of the intervenor's pleading, the evidence proving these oral conditions, or similar ones, is that of the intervenor himself, that of the appellee, and the letters signed by the intervenor (Record, pp. 60, 56). It is apparent that the time of payment was not specified in the writings that the intervenor *now* relies upon, to-wit, the bond and letter transmitting it (Record, pp. 48, 49), nor was it specified in any other writing forming any part of the agreement, and signed by the appellee. Yet it is clear that there was a time fixed in parol for the payment, *viz.,* "upon the procurement by the said Andrew Johnson of the said statement from the Snow Storm Mining Company, *or upon the delivery of said new certificate*" (as pleaded by intervenor; Record, p. 22), or "the said Nicholls agreed to pay the purchase price for the stock upon the receipt of such statement from the secretary of the Company." (Intervenor's testimony, Record, p. 81.) See also the testimony of the appellee. (Record, pp. 84-90.)

The intervenor further insisted, below, that his contract with the appellee and the contract which he desired enforced had a condition in it calling upon the appellee to give an indemnity bond to the Mining Company, as

well as a bond to the intervenor, before payment, and in support of this contention the intervenor testified that the appellee "stated that he would take whatever steps were necessary to procure a certificate for the said 1500 shares from the Snow Storm Mining Company," and put in evidence the letter of March 1, 1906, to the appellee (Record, p. 60) and the Greenough letter (Record, p. 56). This agreement on the part of the appellee, intervenor also pleads in his cross bill (Record, p. 22). That the intervenor so construed the agreement is shown also by the testimony of appellee (Record, p. 89). This part of the contract, which intervenor insisted was the contract made, is not found in any writing signed by the appellee.

The fact that a part of this contract was in parol is proved by *intervenor's admissions* in his pleading and by *his own evidence* at page 81 of the Record, and for this reason the complaint that evidence on behalf of appellee was improperly admitted to prove the parol features of the contract, would be without force. In Smith v. Shell, 82 Mo. 215, 52 Am. Rep. 365, the court said:

"It is not essential to the validity of a contract, that it should stipulate for any time or place of delivery; but if there be such a stipulation, the memorandum must contain it. Browne Stat. Frauds, §384; Benj. Sales, §§209, 210, 251, 349; Story Sales, 270. The memorandum must contain all the material terms of the contract. One exception, the only one, is that of the consideration upon which the promise is founded, allowed by most of the American, but not by the English courts. The time and place of delivery are material stipulations, in all contracts for the purchase and delivery of chattels. If the time and place had not been agreed upon, the memo-

randum would have been construed as a contract for delivery in a reasonable time, and at the vendor's customary place.

But when time or place is stipulated, it goes to the essence of the contract, and must appear in the memorandum. The contract so far as expressed, and so far as the law would supply terms, unexpressed, was to deliver corn in a reasonable time.

Plaintiff testified in effect, that such was not the contract, but that the corn was to be delivered in ten days or two weeks. * * * Conceding that such testimony could not have been introduced by defendant, shall the plaintiff recover upon a contract, which he testifies is not the contract made between him and the defendant and materially different from that alleged in his petition, and evidenced by the memorandum in writing? The statute declares that no contract shall be allowed to be good * * * unless some note or memorandum in writing be made of the bargain, etc. While it might be contrary to public policy, and defeat the very purpose in view in the enactment of the law, to permit a party who signed the contract to prove by parol that there were other stipulations than those contained in the contract; yet if the party seeking to enforce it will voluntarily come into court and testify that the contract contained in the written memorandum is not, in fact, the contract made, it would contravene no public policy to refuse him redress for a breach of the contract, either that actually made or the one evidenced by the written memorandum. The contract actually made cannot be enforced, because not reduced to writing, that contained in the written memorandum should not be, because the party seeking to enforce it voluntarily declares on oath that it is not the contract the parties made.

Mr. Hilliard says: 'If a written contract of sale mentions no price, and it is proved by parol evidence that a price was agreed on, the writing cannot be used as evidence of the agreement between the parties.' Hilliard Sales, 232. And to the same effect are the authorities above cited. Boardman v. Spooner, 13 Allen, 359. If the suit is for a non-delivery of the goods sold, the plaintiff must fail in such a case; but if sold by

a written contract, and delivered, the vendor may recover in a proper suit, because the delivery and acceptance of the goods satisfies the statute. In the case at bar plaintiff sued on one contract, and was permitted to recover upon one different in its terms. Both on reason and authority, in the light of Lowry Smith's testimony, we think that the memorandum relied upon by plaintiffs is insufficient under the statute, and the defendant's second refused instruction to that effect should have been given."

Assuming, however, that the appellee's evidence is necessary to prove the parol terms of the contract (which, however, is not the case), and assuming further that appellee's testimony had been competently objected to (which also is not the case), nevertheless it would be admissible to show that this intervenor, knowing the contract actually made to have been the oral one, was wrongfully imposing upon this court of equity another contract than the one actually made, and asking the court's aid to enforce it. In Turner v. Lorillard Co. (Ga.), 28 S. E. 383, the court said:

"If the writing relied on in this case was not sufficient to show that the parties intended to contract specifically as to price, and therefore make such writing insufficient under the statute, on account of the absence of such price from it, the parol evidence which the court admitted made it absolutely certain that such was the intention of the parties. It clearly appeared from this evidence that under the contract sought to be set up a fixed price was intended to be agreed on, and that it was not the intention of the parties to leave the price of the article sold to be determined by what it was reasonably worth in the market. Such being the prior verbal stipulation, the absence of the price from the writing rendered it nugatory. Where the writing might otherwise be construed to refer the price to a *quantum valebat,* there seems to be no doubt that parol evidence

would be admissible to show a prior verbal intention contrary to such presumption, and thereby invalidate the writing. While parol evidence will never be admitted in aid of a party who has an incomplete writing, it will be admitted to defeat a party who is attempting to impose upon the court a writing which is not really a compliance with the statute. Wood. Stat. Frauds, §391. There was no error in granting a nonsuit. Judgment affirmed."

Fisher v. Andrews (Md.), 50 Atl. Rep. 407.
Glass v. Hulbert, 102 Mass. 34-35.

It thus being conclusively and competently shown both by the admissions of the intervenor in his pleadings and by testimony that material terms of the contract were in parol, it becomes certainly barred by the statute. In the case of Mentz v. Newitter, 122 N. Y. 491, 19 Am. St. Rep. 514, the court said:

"Tested by the rule, as established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the statute. It must be such that when it is produced in evidence it will inform the court or jury *of the essential facts set forth in the pleading,* and which go to make a valid contract. Such essentials must appear without the aid of parol proof, either from the memorandum itself or from a reference therein to some other writing or thing; and such essentials to make a contract must consist of the subject-matter of the sale, the terms, and the names or a description of the parties."

In Caterlin v. Bush (Ore.), 65 Pac. 1065, the court said:

"There is still another objection vital to the admission of the memorandum in evidence. *It does not support the agreement set out in the complaint. This is apparent from a comparison of the terms alleged with those supposed to be stated in the writing.* It contains

no allusion to the alleged fact that the defendant agreed to convey to a third person, and shows quite to the contrary of what is alleged touching the payment of expenses for cablegrams. No further comment is necessary."

In Bacon v. Eccles, 43 Wis. 227, the court said:

"We think that neither of these writings contains a note or memorandum of the contract alleged n the complaint. * * * We conclude, therefore, that there is no evidence in the case that any note or memorandum in writing *of the contract alleged in the complaint* was ever subscribed by the defendants."

It is true, as stated in appellant's brief, that where the parties themselves have failed to express the time for payment or performance, the court will *presume* that they themselves intended a reasonable time, or possibly *infer* that payment and delivery are intended by the parties to be synchronous; but where the parties themselves have clearly expressed their intention and fixed upon a definite time, there is no room for presumption or inference, and the court must carry out such intention. Here the time of payment, as testified to by the appellee, was immediately upon his furnishing a statement to the intervenor, and, as pleaded by the intervenor, it was immediately upon receipt of such statement *or* delivery of the certificate of stock. The *testimony* of the intervenor corroborates the appellee in this regard; but in any event, whichever is right, there was a time definitely fixed for payment. Such time is omitted from the writing and it is an essential term.

In Waterman v. Mergs, 4 Cushing, 497, the court said:

"A letter from the purchaser to the vendor leading to parol agreement for the sale of goods and inquiring whether they will be ready upon the time agreed upon but not mentioning the quantity, quality, or the price of the goods, or the time of payment, is not a sufficient memorandum to take the agreement out of the statute of frauds."

In Gault v. Stormont, 51 Mich. 636, Mr. Justice Cooley said:

"There was no written evidence of the sale of the lots except the receipt which was given for the $75.00 and that was insufficient to answer the requirements of the statute of frauds, for though it specified the purchase price, it failed to express the time or times of payment, and there is no known recognized custom to fix what is thus left undetermined. A memorandum to be sufficient under the statute must be complete in itself and leave nothing to rest in parol."

St. L. I. M. & S. Ry. Co. v. Bidler, 45 Ark. 17-26.
Elliott v. Barrett, 144 Mass. 256.
O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54.

Davis v. Shields, 26 Wendell, 341.
Brogigian v. Book Lovers Library (Mass.), 79 N. E. 769.

In the latter case the court said:

"In the case at bar the letter relied on to satisfy the statute of frauds did not state all that this defendant was required to do. *It was not a memorandum of the oral contract which the plaintiff claimed was made* and the ruling of the presiding judge was right."

In Porter v. Patterson (Ind.), 85 N. E. 797, the court said:

"At that time the contract being not in writing, the

appellant Patterson had a right to repudiate it or cancel it, whether for a just or an unjust reason, or for no assigned reason; for the contract was not enforceable against him under the statute of frauds."

No addition can be made to the writing as against the statute of frauds.

Ringer v. Holtzclow (Md.), 20 S. W. 800.
Broadway Hospital v. Decker, 47 Wash. 586.

THE COMMON LAW RULE THAT TITLE TO PERSONAL PROPERTY MAY PASS BY VIRTUE OF A PAROL AGREEMENT CANNOT BE INVOKED IN AID OF THE CONTRACT REQUIRED BY THE STATUTE OF FRAUDS TO BE IN WRITING.

Appellants in their brief state their position thus:

"The contract was an executed sale. This is not a case to be assimilated to those in which it is held that the property was not changed because something remained to be done by the seller to the article sold." (Brief, p. 9).

In the case at bar the property itself, to-wit, the stock, had not been delivered and was still and remained in the hands of the corporation; the purchase money had not been paid to the owner. No indicia of present ownership had been given to the intervenor. The bond provided that the owner *would* turn over the property

within seventy days (Record, p. 49). The letter to the intervenor of December 20, stated that the owner *could* deliver the property in seventy days (Record, p. 48). In the letter of December 29 the appellee states to the Mining Company that he wants a statement sent to him "that *I* am the owner of 1500 shares of Snow Storm stock, and that a certificate of same will be issued to *me* as soon as these notices have run. * * * Now he wants a statement from you that *I* own this stock and that you will issue this certificate," etc. (Record, p. 51.) The Mining Company in its letter of January 2 (p. 52) states in reply that it will issue the new certificate to *Mr. Johnson.* There is absolutely nothing in the record to support the strained position taken in appellee's brief. It was clearly not the intention of these parties to pass title to the property. Most certainly not until it was paid for, but if such an intention could be found in the contract and it could be called an executed sale, it is nevertheless still barred by the statute of frauds.

The State of Idaho, where the suit was brought, provides for the invalidity of certain agreements unless in writing and among others the following:

"An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, *unless the buyer accept and receive part of such goods and chattels,* or the evidences, or some of them, of such things in action, *or pay, at the time, some part of the purchase money.*" (2 Idaho Rev. Codes, §6009.)

The statute of Washington is substantially identical with that of Idaho (§4577 Ballinger's Ann. Codes & Stats. of Washington). The statute of Idaho is applicable.

Buhl v. Stevens et al., 84 Fed. 924.
May v. Sloane, 101 U. S. 797.

In Shindler v. Houston, 1 N. Y. 261, the court said:

"By the common law, independently of the statute of frauds, a present sale of specific ascertained goods was complete, as between the parties, without delivery, as soon as the terms of sale were agreed on and the bargain was struck, nothing remaining to be done to put the goods in a deliverable state, and the property was thereby vested in the buyer, and was at his risk. * * * And the rule is the same since the statute of frauds, in cases of sales of goods not within the statute, and in cases within the statute where the contract is evidenced by writing. So where there is no writing, if there has been payment of part or all of the price, as provided in the 17th section of the statute. Coster v. Davies, 46 Am. Dec. 311."

Alderton v. Buckotz, 3 Mich. 322.

In Carman v. Smick, 15 N. J. L. 252, the court said:

"A contract for the sale of goods for upwards of thirty dollars and no delivery or earnest money paid nor any note or merandum thereof made in writing is within the statute of frauds. Rev. Laws, 148, Section 15. The distinction as to executed and executory contracts as respects the statute of frauds, has been overruled."

In Hinchman v. Lincoln, 124 U. S. 38, the court said:

"In order to take the contract out of the operation of the statute, it was said by the New York Court of Appeals in Marsh v. Rouse, 44 N. Y. 643, that there must be 'acts of such a character as to place the property unequivocally within the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price.' This is adopted in the text of Benjamin on Sales, §179, Bennett's 4th Am. Ed., as the language of the decisions in America. In Shindler v. Houston, 1 N. Y. 261, 49 Am. Dec. 316, Gardner J., adopts the language of the court in Phillips v. Vistoli, 2 Barn. & C., 511, 'That to satisfy

the statute there must be a delivery by the vendor with the intention of vesting the right of possession in the vendee and there must be an actual acceptance by the latter with the intent of taking possession as owner.' And adds: 'This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intention of the parties. Mere words are not sufficient. Bailey v. Ogden, 3 Johns 421, 3 Am. Dec. 509. * * * In a word the statute of fraudulent conveyances and contracts pronounces these agreements when made void unless the buyer should "accept and receive some part of the goods." The language is unequivocal and demands the action of both parties, for acceptance implies delivery and there can be no complete delivery without acceptance.' In the same case, Wright, J., said: 'The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principles of constructive delivery to the utmost limit. * * * Where the acts of the buyer are equivocal and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them and hold the contract to be within the statute. I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract.' "

Thus the contemplated sale never was a completed transaction (in its relation to the statute of frauds), by reason of the absence of delivery and payment. Of course that the intervenor, long after the making of the contract, wrongfully got possession of the certificate belonging to the appellee, without his knowledge or consent, will not help the appellants in this court of equity over this difficulty. From the 19th day of December,

1905, to the 27th day of February, 1906, upon which the appellee repudiated the contract, the situation was analagous to that in Denney v. Williams, 5 Allen (Mass.) 1-9.

"It appears, therefore, that up to the time when the defendant repudiated the contract on the 26th day of September it stood merely in parol without any act of delivery or acceptance, either actual or constructive."

Finally, and as conclusively showing that the contract when made was not an executed sale passing the property, we point to the letter of March 1, written by the intervenor to the appellee (Record, p. 60) and put in evidence by the intervenor, in which the intervenor says:

"When you left here in December it was agreed that if the contract did not stand, you were to write me to that effect at once, and ask for the return of the bond."

The language quoted on page 9 of appellant's brief from the letter of appellant to the Snow Storm Mining Company (Record, p. 51), considered with the balance of the record, does not disturb, it is submitted, in the slightest particular the inevitable conclusion that there was no executed sale intended and that title did not pass by the making of the contract. And though this language should be thought to outweigh all of the balance of the record and to show an executed sale, it still fails to show that the buyer did "*accept and receive part of such goods and chattels*" or did "*pay, at the time, some part of the purchase money*" (2 Idaho Code, Sec. 6009), so as to take the contract out of the statute of frauds. In

the language quoted with approval by the United States Supreme Court in Hinchman v. Lincoln, *supra,* "mere words are not sufficient."

Kirby v. Johnson, 22 Mo. 354.
Gardett v. Belnap, 1 Cal. 399.
Malone v. Plato, 22 Cal. 103.
Harvey v. St. L. etc. Association, 39 Mo. 211.
Matthiessen & Weichers Refining Co. v. McMahon's Administrator, 38 N. J. L. 536.
Roger v. Jones, 129 Mass. 420.
Marsh v. Rouse, 44 N. Y. 633.
Caulkins v. Helman, 47 N. Y. 439.
Hooker v. Knab, 26 Wis. 511.

But the expression "I have sold this stock and have given a bond to the purchaser to deliver same in sixty days," has no such significance as is attributed to it, even when standing alone. It is clearly merely a layman's way of stating that he had made a contract for the sale of the stock; and if the whole letter be considered together, it affirmatively negatives the intention of an executed sale and passage of title. If the sale were then executed and the title in the buyer, the letter would naturally have directed the Snow Storm Mining Company to issue the certificate to the intervenor because he was the owner, but on the contrary it says that the certificate is to issue to the *appellee,* and that the *intervenor* wants a statement that it will *so* issue.

The proposition on page 11 of appellant's brief that the appellee is estopped by this letter to the Snow Storm Mining Company (Record, p. 51) "from ever demanding

the issuance of a new certificate to him," is, we are quite sure, not made seriously, in view of the fact that the letter itself declares that the *appellee* is the owner of the stock, that the company is to issue a statement to that effect, and directs the company to issue the certificate to *appellee*. This the company agrees to do, saying in its reply letter to the appellee that it has his letter "and will * * * issue to *you* a new certificate for 1500 shares." (Record, p. 52.) We do not think that the willful violation of the instructions of the recorded owner of these shares to issue the certificate to *him*, and the further violation by the company of its clear agreement to do so, exactly meets the four or five elements the rule of estoppel renders necessary to constitute an estoppel against the *appellee*. We can, however, readily see how this surreptitious disposition of the appellee's property by the appellant mining company estopps *it* from making any resistance whatever to appellee's demand. We fail to see, also, how a letter written by the *intervenor* (Record, pp. 53, 54) to the Snow Storm Mining Company can aid to create an estoppel against the *appellee*. This is especially true in view of the fact that the intervenor's letter tells the company that the intervenor has the company's letter to the appellee agreeing to issue the certificate to the *appellee*, and that thus both the company *and* the intervenor acted in knowing violation of the arrangement between the company and appellee. That it was contemplated by the agreement between the intervenor and appellee that the certificate

should issue to appellee, is strongly shown by the fact that from January 4, when the intervenor received the letter from the company stating that it *would* be so issued (Record, pp. 52, 53), certainly up to February 24th following, when intervenor wrote to the company, (Record, p. 53) intervenor made no objection to that arrangement. The appellant company and the intervenor clearly acted at their peril in securing the stock to the intervenor and can base no advantage in a court of equity upon a possession so gained.

Shares of corporate stock are goods, wares and merchandise within the statute of frauds.

Smith v. Bouth et al., 33 Ws. 19.
Gibbs v. Usher et al., 10 Fed. Cas. 5387.
Banta v. Chicago (Ill.), 40 L. R. A. 611, 616.
Tisdale v. Harris, 20 Pick. 9.
Boordman v. Cutter, 128 Mass. 388.
Baltzen v. Nicolay, 53 N. Y. 467.
Nichols v. Clark, 81 N. Y. S. 252.
Hightower v. Ansley (Ga.), 54 S. E. 939.
20 *Cyc.* 244.
2 *Cook on Corp.,* 5th Ed., p. 762, Sev. 339.
Colton v. Raymond (C. C. A. Md. Cir.), 114 Fed. 863.
Koening v. Wilder (C. C. A. Ind. Cir.), 128 Fed. 558.
Franklin v. Matoa Gold Min. Co. (C .C. A. 8th Cir.), 158 Fed. 941.
Hinchman v. Lincoln, 124 U. S. 38-31.

TIME IS OF THE ESSENCE OF THE CONTRACT.

The claim of appellants on page 12 of their brief that, admitting that the intervenor agreed to pay on the delivery of the statement, intervenor, in not so paying was not in default, because time was not expressly made the essence of the contract, needs but brief discussion. If appellants admit that this parol provision existed at all, it bars the contract by the statute of frauds. But if we let in parol evidence to show what the contract was, and ignore for the moment the statute of frauds, then immediately we show by that kind of evidence that the time of payment *was* of the essence of the contract.

Mr. Johnson, the appellee, in stating the circumstances attending his giving the intervenor the bond, said:

"I also went and saw two friends and stated the circumstances to them and asked them if they would go on the bond with me, that I was very desirous of making this sale, because I was hard up and needed the money. * * * I went in when I got to Spokane and called on Mr. Nicholls and he had the bond there and seemed to be satisfied with it, and we talked matters over a little bit and I gave him to understand that I was expecting my money. Mr. Nicholls then stated to me that he had not so understood it from the conversation we had over the telephone the day before, and he said that he was unable to get his client to come through, that his client on that proposition would not pay him the money. Then I told Mr. Nicholls 'if that is the case we can't

do any business because the only purpose I have in selling this property is because I need the money at the present time, and that is all there is to it'." (Record, pp. 86, 87, 88.)

Appellee further testified that thereupon it was arranged between him and the intervenor that the deal would go through on that basis, if he gave to the intervenor in addition to the bond, the statement from the mining company.

There is adduced from this evidence an unmistakable intention on the part of the parties that the time of payment should be essential, and it is certain that the appellee would not have made the contract at all upon any other basis than that of immediate payment. Mr. Pomeroy says:

"Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforcement." (4 Pomeroy's Equity Jurisprudence, §1408.)

In Longworth v. Taylor, 1 McLean 399; 14 Peters 173, Mr. Justice Story said:

"In the first place there is no doubt that time may be of the essence of a contract for the sale of property. It may be so by the express stipulation of the parties, or it may arise by implication from the very nature of the property, *or the avowed objects of the seller or the purchaser.*"

In King v. Ruckman, 20 N. J. Equity 354, the Chancellor said:

"A time stipulated in an agreement for performance will be held of the essence when from the nature of the subject-matter or the object of the parties the time of performance was intended to be such. * * * *A party will be allowed to show by parol* that at making of the contract the time was considered as of the essence. * * * But these words connected with a negotiation and statement at the time of the contract are sufficient, in my opinion, to make the time of the essence of this contract, and do make it so. Ruckman, at the drawing of the contract, expressly told King that he wanted the $19,900 to enable him to fulfill his contracts for purchase which were part of the subject-matter of the agreement."

Finally, on this point, the subject-matter of the contract was mining stock which fluctuated in value daily. (Intervenor's cross complaint, Record, p. 24.) The necessary inference from this condition of the subject-matter of the contract is that immediate payment was intended.

"When the nature of the subject-matter is such that its value necessarily changes, that is either increased or decreases with the mere lapse of time, time is then of the essence of the contract, and performance must be completed at the specified period. * * * Closely analagous in form and clearly governed by the same principle is the case of contracts, the subject-matter of which is, from its nature, liable to frequent, sudden and considerable changes or fluctuations in value."

Pomeroy on Specific Performance, §384.
6 *Pomeroy's Equity Jurisprudence,* §811, Note 34.
Hoyt v. Tuxbury, 70 Ill. 339-340.

THE CONTRACT NOW SOUGHT TO BE ENFORCED DOES NOT ENTITLE APPELLANTS TO SPECIFIC PERFORMANCE.

In their brief on page 12, appellants describe the contract they *now* ask to have enforced between the intervenor and appellee, thus:

"It is our contention that a full and complete contract was made in the letter and bond accompanying it from appellee to Nicholls, and that this contract was in no manner modified. * * * That the letter and bond referred to make a complete contract which is not affected by the statute of frauds."

This is not the contract pleaded. From this "letter and bond" (Record, pp. 48, 49) are omitted several terms of the contract pleaded by intervenor, or proven, some being shown by the proof put in by the intervenor, and some by the proofs put in by appellee without objection, to-wit, the time of payment, the term relative to the statement, the right of appellee to withdraw the bond, and the obligation on appellee to do all things necessary to get the certificate from the company. The contract *now* sought to be enforced, therefore, does not contain all the terms of the contract actually made. This prevents its enforcement.

"A contract that is *incomplete,* uncertain, or indefinite in its material terms will not be specifically enforced in equity. * * * 'The element of *completeness* denotes that the contract embraces all the material terms;

that of *certainty* denotes that each one of these terms is expressed in a sufficiently exact and definite manner. An *incomplete contract, therefore, is one from which one or more material terms have been entirely omitted.*' "

> 2 *Pomeroy's Equitable Remedies* (1905), Sec. 764.

As to the contract *pleaded,* the conflicting proof has prevented the intervenor from showing with certainty exactly what were the terms of the agreement.

"Wherever the contract rests in whole or in part on parol evidence, the elements of incompleteness, *uncertainty,* and indefiniteness may exist when the proof is insufficient, conflicting, and leaving room for doubt as to what the precise terms were, *for the plaintiff is bound to establish clearly and satisfactorily the existence of the contract and its terms.*"

> 2 *Pomeroy's Equitable Remedies* (1905), Sec. 765.

Finally the intervenor *pleaded* a contract with several conditions in it (Record, p. 22), and now claims to recover upon a contract made up of the letter and bond, (Record, pp. 48, 49) which is an essentially different contract from that pleaded, the conditions and especially the time of payment being omitted therefrom. This is a total failure of proof. The intervenor cannot plead one contract and recover upon proof of another.

> 1 *Greenlead on Ev.,* Sec. 66.
> *Foerster v. Foerster* (Ind.), 38 N. E. 427.
> *Stearns v. Martin,* 4 Cal. 230.
> *Gossom v. Badgett* (Ky.), 99 Am. Dec. 658.
> *Sager v. Tupper,* 38 Mich. 265.
> *Potter v. Brown,* 35 Mich. 274.

Smith v. Shell, 82 Mo. 215.
Leland and Crane v. Douglass, 1 Wend. 490.

We submit the decree should be affirmed.

Respectfully submitted,

REESE H. VOORHEES,
Counsel for Appellee.

No. 1856

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE DOME CITY BANK (a Corporation), (Defendant),
Plaintiff in Error,

vs.

MRS. C. BARNETT (Plaintiff),
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys.]

In the District Court for the Territory of Alaska, Fourth Division.

Number 1084.

Mrs. C. BARNETT,

Plaintiff,

vs.

DOME CITY BANK,

Defendant.

CECIL H. CLEGG, Esquire, Attorney for Plaintiff and Defendant in Error.

Messrs. WICKERSHAM, HEILIG & RODEN, Attorneys for Defendant and Plaintiff in Error,

Whose Postoffice Addresses are Fairbanks, Alaska.

[Certificate of Clerk District Court to Record.]

[Title of Court and Cause.]

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, E. H. Mack, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the following typewritten pages numbered from one to two hundred and twenty-one, inclusive, constitute a true, full and complete copy, and the whole thereof, of the pleadings, judgment, bill of exceptions, assignment of errors, and also the original writ of error, original citation, original orders extending

time to perfect appeal and original stipulation relative to printing of record, and all other records in the case as demanded by the praecipe for making up transcript filed in this office.

I do further certify that each record contains a true, full and complete copy of the indorsements thereon; that the cost of preparing said record is $83.90, and that same has been fully paid to the Clerk of this court, by the plaintiff in error.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, this 13th day of April, 1910.

[Seal] E. H. MACK,
Clerk of the District Court, Territory of Alaska, Fourth Division.

[Title of Court and Cause.]

Complaint.

Comes now plaintiff, and for cause of action against defendant alleges:

I.

That at all times herein mentioned the defendant was and now is a corporation organized under the laws of the State of Washington, and having a banking office and doing a banking business at the town of Dome City, in the aforesaid Division and Territory.

II.

That on 12th June, 1907, one J. L. Tobin specially deposited with defendant for safekeeping, at the banking office of said defendant in said Town of

Dome City, a large gold nugget, belonging to the said J. L. Tobin, of the weight of 73.55/100 ounces, and of the value of $1400; which nugget the defendant then and there accepted and received from said J. L. Tobin, as bailee thereof for the purpose aforesaid, and then and there promised and agreed to deliver up and return upon demand.

III.

That thereafter, on 22d July, 1908, the said J. L. Tobin, for a valuable consideration, sold, assigned and transferred to plaintiff herein the said gold nugget described, and plaintiff now is and ever since said 22d July, 1908, has been the owner and entitled to the immediate and exclusive possession of the said nugget.

IV.

That subsequent to said 22d July, 1908, and prior to the commencement of this action, plaintiff demanded of defendant the return of said nugget and delivery of possession thereof to plaintiff, but defendant refused to surrender up and deliver same to plaintiff, and still continues to so refuse, and wrongfully and unlawfully withholds same from plaintiff, to plaintiff's damage in the sum of $500.

Wherefore plaintiff prays judgment against defendant for recovery of possession of the said nugget, or for the sum of $1400, the value thereof, in case delivery cannot be had; for the sum of $500 damages for the wrongful withholding of said property by defendant, and for plaintiff's costs and disbursements.

JEREMIAH COUSBY,
Attorney for Plaintiff.

District of Alaska,
Fairbanks Precinct,—ss.

I, Mrs. C. Barnett, being first duly sworn, depose and say:

That I am the plaintiff named in the foregoing complaint in the above-entitled action; that I have heard the said complaint read and know the contents thereof, and that I believe the same to be true.

Mrs. C. BARNETT.

Subscribed and sworn to before me 6th day of August, A. D. 1908.

[Seal] JEREMIAH COUSBY,
Notary Public in and for the District of Alaska.

[Endorsed]: Original. No. 1084. In the District Court of the Territory of Alaska, Third Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, Defendant. Complaint. Filed in the District Court, Territory of Alaska, Third Div. Aug. 6, 1908. O. A. Wells, Clerk. By E. A. H., Deputy. Jeremiah Cousby, Attorney for Plaintiff, Fairbanks, Alaska.

[Title of Court and Cause.]

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff says:

I.

Defendant admits each and every allegation contained in the first paragraph of said complaint.

II.

For answer to the allegations contained in the sec-

ond paragraph of said complaint, defendant admits that on or about June 12, 1907, one J. L. Tobin deposited with defendant, without hire, for safekeeping, a gold nugget belonging to said Tobin, weighing 73.55 ounces, and denies that it was of any greater value than $1283.16, and denies each and every other allegation contained in said second paragraph.

III.

Defendant denies each and every allegation contained in paragraph three of said complaint.

IV.

Defendant admits that at or about July 22, 1908, the plaintiff demanded possession of said nugget from defendant and denies each and every other allegation contained in paragraph number four in said complaint.

And for a further and separate defense to the cause of action alleged in said complaint, defendant says:

I.

That on or about the 12th day of June, 1907, one J. L. Tobin deposited with this defendant and defendant received from the said Tobin, without hire, for safekeeping that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 and no more; that about thirty days thereafter the said Tobin came and requested the defendant to return the said nugget to him and the defendant then and there delivered the said nugget to the said Tobin, who received and carried the same away from the possession of defendant.

And for a second further and separate defense to the cause of action alleged in said complaint, defendant says:

I.

That on or about the 12th day of June, 1907, one J. L. Tobin deposited with this defendant and defendant received from the said Tobin, without hire, for safekeeping that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 and no more; that about thirty days thereafter the said Tobin came and requested the defendant to return the said nugget to him and the defendant then and there delivered the said nugget to the said Tobin, who received and carried the same away from the possession of defendant.

II.

That thereafter and about the last day of October, 1907, the said Tobin returned the said nugget and again deposited it with defendant, and being then and there desirous of obtaining advances of money on his check in excess of his deposit, he then and there pledged the said nugget to the defendant bank upon an agreement with the bank that the said Tobin might draw money from the said bank in the amount of the value of said nugget; and long prior to the date of the alleged sale of the said nugget to the plaintiff the said Tobin drew against the value of the said nugget and this defendant paid him the full value thereof; that thereafter and about the month of July, 1908, the said Tobin duly sold and assigned the said nugget to Margaret Mulrooney and

this defendant gave said Tobin in consideration thereof due credit on the debt which he then owed to defendant bank in the sum of the full value of the said nugget, to wit, the sum of $1283.16.

Wherefore defendant prays that this defendant be dismissed hence with its costs and disbursements and have judgment against plaintiff therefor.

Fairbanks, Alaska, Jan. 16, 1909.

JAMES WICKERSHAM,
Attorney for Defendant.

Territory of Alaska,
Fairbanks Precinct,—ss.

Jesse Noble, being first duly sworn, deposes and says that he is the president and manager and managing agent of the defendant company, the Dome City Bank; that the said Dome City Bank is a corporation organized under the laws of the State of Washington and that affiant is its president and general manager; that he has read the foregoing Answer in the above-entitled cause, knows the contents thereof and believes the same to be true.

JESSE NOBLE.

Subscribed and sworn to before me this 16th day of January, 1909.

JAMES WICKERSHAM,
Notary Public in and for the Territory of Alaska,
Residing at Fairbanks.

Service by copy admitted this 19th day of January, 1909.

JEREMIAH COUSBY,
Attorney for Plaintiff.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Third Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, Defendant. Answer. Filed in the District Court, Territory of Alaska, Third Div. Jan. 19, 1909. O. A. Wells, Clerk. By ————, Deputy. James Wickersham, Attorney for Defendant.

No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Plaintiff's Exhibit No. 4. Filed in Open Court Feb. 10, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Reply.

Comes now plaintiff, and for reply to the Answer of defendant filed herein alleges:

I.

That she denies each and all the allegations contained in the alleged "further and separate defense" set forth in said answer, save and except those to the effect that on or about the 12th day of June, 1907, J. L. Tobin deposited with defendant, and defendant received from said Tobin, for safekeeping, without hire, that certain gold nugget mentioned and described in plaintiff's complaint herein.

II.

That she denies each and all the allegations contained in the alleged "second further and separate defense" set forth in said Answer, save and except

the allegation in paragraph number one of said "second further and separate defense" to the effect that on or about 12th June, 1907, J. L. Tobin deposited with defendant, and defendant received from said Tobin, for safekeeping, without hire, the gold nugget mentioned and described in plaintiff's complaint herein.

Wherefore plaintiff renews the prayer of her complaint herein.

JEREMIAH COUSBY,
Attorney for Plaintiff.

District of Alaska,
Fairbanks Precinct,—ss.

I, Mrs. C. Barnett, being first duly sworn, depose and say:

That I am the plaintiff in the above-entitled action; that I have read the foregoing Reply in said action, know the contents thereof, and believe the same to be true.

Mrs. CATHERINE BARNETT.

Subscribed and sworn to before me the 25th January, 1909.

[Notary Seal] JEREMIAH COUSBY,
Notary Public in and for the District of Alaska.

Service of a copy hereof admitted the 25th January, 1909.

JAMES WICKERSHAM,
Atty. for Deft.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Third Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, Defendant.

a written contract, and delivered, the vendor may recover in a proper suit, because the delivery and acceptance of the goods satisfies the statute. In the case at bar plaintiff sued on one contract, and was permitted to recover upon one different in its terms. Both on reason and authority, in the light of Lowry Smith's testimony, we think that the memorandum relied upon by plaintiffs is insufficient under the statute, and the defendant's second refused instruction to that effect should have been given."

Assuming, however, that the appellee's evidence is necessary to prove the parol terms of the contract (which, however, is not the case), and assuming further that appellee's testimony had been competently objected to (which also is not the case), nevertheless it would be admissible to show that this intervenor, knowing the contract actually made to have been the oral one, was wrongfully imposing upon this court of equity another contract than the one actually made, and asking the court's aid to enforce it. In Turner v. Lorillard Co. (Ga.), 28 S. E. 383, the court said:

"If the writing relied on in this case was not sufficient to show that the parties intended to contract specifically as to price, and therefore make such writing insufficient under the statute, on account of the absence of such price from it, the parol evidence which the court admitted made it absolutely certain that such was the intention of the parties. It clearly appeared from this evidence that under the contract sought to be set up a fixed price was intended to be agreed on, and that it was not the intention of the parties to leave the price of the article sold to be determined by what it was reasonably worth in the market. Such being the prior verbal stipulation, the absence of the price from the writing rendered it nugatory. Where the writing might otherwise be construed to refer the price to a *quantum valebat,* there seems to be no doubt that parol evidence

would be admissible to show a prior verbal intention contrary to such presumption, and thereby invalidate the writing. While parol evidence will never be admitted in aid of a party who has an incomplete writing, it will be admitted to defeat a party who is attempting to impose upon the court a writing which is not really a compliance with the statute. Wood. Stat. Frauds, §391. There was no error in granting a nonsuit. Judgment affirmed."

Fisher v. Andrews (Md.), 50 Atl. Rep. 407.
Glass v. Hulbert, 102 Mass. 34-35.

It thus being conclusively and competently shown both by the admissions of the intervenor in his pleadings and by testimony that material terms of the contract were in parol, it becomes certainly barred by the statute. In the case of Mentz v. Newitter, 122 N. Y. 491, 19 Am. St. Rep. 514, the court said:

"Tested by the rule, as established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the statute. It must be such that when it is produced in evidence it will inform the court or jury *of the essential facts set forth in the pleading,* and which go to make a valid contract. Such essentials must appear without the aid of parol proof, either from the memorandum itself or from a reference therein to some other writing or thing; and such essentials to make a contract must consist of the subject-matter of the sale, the terms, and the names or a description of the parties."

In Caterlin v. Bush (Ore.), 65 Pac. 1065, the court said:

"There is still another objection vital to the admission of the memorandum in evidence. *It does not support the agreement set out in the complaint. This is apparent from a comparison of the terms alleged with those supposed to be stated in the writing.* It contains

Wherefore, by reason of the premises and the law, it is now by the Court Ordered, Adjudged and Decreed: That the plaintiff Mrs. C. Barnett is the owner and entitled to the immediate and exclusive possession of that certain gold nugget described in the complaint in this action, to wit, that certain large gold nugget weighing seventy-three and fifty-five one-hundredths ounces, of the value of Twelve Hundred Fifty Dollars and Thirty-five Cents, and that said plaintiff recover of and from the defendant immediate possession of the same, and if recovery thereof cannot be had, it is hereby ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant, the Dome City Bank, a corporation, the value thereof as assessed by the said jury in their said verdict aforesaid, to wit, the sum of Twelve Hundred Fifty Dollars and Thirty-five Cents, in lawful money of the United States of America, and further, that the plaintiff do have and recover of and from the defendant her costs and disbursements, taxed at the sum of Dollars, in this action laid out and expended.

Dated at Fairbanks, Alaska, this seventeenth day of February, A. D. one thousand nine hundred ten.

THOMAS R. LYONS,
Judge.

Entered in Court Journal No. 9, page 753.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, 4th Div. Mrs. C. Barnett, Plff., vs. Dome City Bank, a Corporation, Deft. Judgment. Filed in Open Court Feb. 17, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack,

Clerk. By E. A. Henderson, Deputy. Cecil H. Clegg, Attorney for Plaintiff.

[Title of Court and Cause.]

Before Hon. THOMAS R. LYONS, Judge Presiding and a Jury.

February 10-11, 1910.

Appearances:

For the Plaintiff, CECIL H. CLEGG, Esqre.

For the Defendant, ALBERT R. HEILIG, Esqre.

Bill of Exceptions.

Transcript of the Evidence.

And be it further remembered: That thereafter and on the 10th day of February, A. D. 1910, said cause came on regularly for trial before a jury, and the respective parties by their counsel having announced themselves ready for trial, a jury was thereupon called and duly impaneled and sworn to try said cause, after which counsel for the respective parties made their opening statements to the jury; whereupon to maintain the issues on her part the plaintiff introduced the following evidence and the following proceedings were had, to wit:

[Testimony of Mrs. C. Barnett, the Plaintiff, in Her Own Behalf.]

Mrs. C. BARNETT, the plaintiff, being called as a witness in her own behalf, and thereto first duly sworn, testified as follows on

Direct Examination.

(By Mr. CLEGG.)

Your name is Mrs. C. Barnett? A. Yes, sir.

Q. You're the plaintiff in this action?

A. Yes, sir.

Q. Where do you live, Mrs. Barnett?

The COURT.—Speak out loud, so these gentlemen can hear you, Mrs. Barnett.

Mr. CLEGG.—Where do you live?

A. At present time I am living in First Avenue, No. 322, in Fairbanks.

Q. How long have you been in the Fairbanks District?

A. About—over three years—four years in July or June.

Q. Are you a widow? A. Yes, sir.

Q. What occupation have you been engaged in?

A. I have been following cooking out on the claims.

Q. Do you know a man by the name of J. L. Tobin? A. Yes, sir.

Q. Did you have some business acquaintance with him prior to the 22d day of July, 1908?

A. Yes, sir—well, I worked for him at the claim.

Q. Did you ever purchase a certain nugget from

(Testimony of Mrs. C. Barnett.)

him? A. Yes, sir.

Q. What sort of a nugget was it?

A. It was a large nugget, taken out from somewhere on No. One Above on Dome Creek.

Q. How much did it weigh?

A. Well, I don't remember how much it weighed, but it was valued at about twelve hundred dollars or more.

Q. Twelve or thirteen hundred dollars—can you recall how much it was, how many ounces?

A. I don't remember how many ounces it was—I think seventy-five and something.

Q. Somewhere in that neighborhood?

A. Yes, sir.

Q. Did he give you any document at the time of the purchase of it from him?

A. Yes, sir, he gave me a bill of sale of it.

Q. Where were you at that time?

A. I was on No. 20 Below on Dome Creek.

Q. I'll ask you to examine this paper here and state whether or not that's the bill of sale he gave you at that time Mrs. Barnett? (Hands paper to witness.) A. Yes, sir.

Plaintiffs offer the Bill of Sale in evidence and ask that it be marked Plaintiff's Exhibit No. 1.

No objection. (So marked by Clerk.)

The COURT.—What is the date of that instrument, Mr. Clegg?

Mr. CLEGG.—July 22, 1908.

The COURT.—Do you desire to read it to the jury now?

(Testimony of Mrs. C. Barnett.)

Mr. CLEGG.—I was going to do that at the conclusion of the testimony of this witness. Now, did Mr. Tobin at that time deliver to you any other document?

A. Yes, sir; he gave me a certificate of deposit, I believe you call it.

Q. What did that call for?

A. It called for that large nugget he left at the Dome City Bank.

Q. By whom was that document issued—who had signed the certificate of deposit?

Objected to as not the best evidence, since counsel says they have the writing.

Mr. CLEGG.—This is merely preliminary. I'll ask you to examine this paper and state whether or not that is the—what you have called a certificate of deposit in your testimony? A. Yes, sir.

Plaintiff offers the document in evidence and asks that it be marked Plaintiff's Exhibit No. 2.

No objection. (So marked by Clerk.)

Q. Now, what consideration did you give Mr. Tobin for this bill of sale—for this property?

A. Well, I worked for Mr. Tobin for—let me see—I think I worked there for about eight or nine months, and there was some borrowed money.

Q. Had he ever mentioned to you prior to the time he gave you this bill of sale that he would secure your—the payment of your wages in that way?

Defendant objects to any conversations between these parties in the absence of the defendant.

The COURT.—I don't think it is material; she is

(Testimony of Mrs. C. Barnett.)

claiming by virtue of the transfer.

Mr. CLEGG.—Did you have any notice at the time you accepted this bill of sale for the property, of any claims of anyone else to it?

A. No, sir, I accepted it in good faith.

Q. Did you ever go to and have any conversation with the Dome City Bank or any officer thereof, with reference to this nugget on the 22d of July, 1908, or prior thereto?

A. Yes, sir, I did; I called up Miss Mulrooney, the cashier of the Dome City Bank at that time, and I told her that I was coming up to have it delivered to me—turned over.

Q. Yes, ma'am.

A. And she said—well, she said, "I see by the paper that Mr. Tobin has given you a bill of sale of it, but," she says, "We have the nugget here and as he owes us we will keep it"—something to that effect; I don't remember the exact words—but she refused to say that I could have it. But I went up there later on—

Q. Yes.

A. —and I don't remember, I think it was a day or so later—or a few days maybe, I went up and asked her for the nugget and she refused.

Q. Was there anyone there at that time with you?

A. Not the first time, I don't think; but I went over and got Mr. Coffer and Mr. Coffer came and stood by the window with me.

Q. Now, state what took place at that time, Mrs. Barnett, as near as you can, when you went there for the nugget.

(Testimony of Mrs. C. Barnett.)

A. Well, Miss Mulrooney seemed to be very excited and I brought the bill of sale up and I said, "I have that certificate for the nugget and also this bill of sale, and I would like it turned over to me"; and she said—well, she said, "We have the nugget and Mr. Tobin owes us and I will keep the nugget." And I said, "O, have you got a mortgage on it?" "Well, no," she says, "Anything like that can be kept as collateral and we don't need any mortgage on it."

Q. And did she give you the nugget?

A. No, sir, she refused to give me the nugget.

Q. Now, who was the owner of that nugget at the time you commenced this action?

A. I was.

Defendant objects and moves that the answer be stricken as a mere conclusion of the witness—that is the sole question in issue.

The COURT.—Of course it is merely a conclusion, Mr. Clegg, because if Mr. Tobin owned it at the time he transferred it to the witness there is no question but the bill of sale shows she was the owner. (After argument.) She may answer, but I think that is the substance of the testimony already in.

Defendant excepts.

Mr. CLEGG.—Did you ever part with your title to the property between the time you had the conversation at the bank and up to the time you commenced this action? A. No, sir.

Q. And who owned it at the time, and was in possession of it at the time of the commencement of

(Testimony of Mrs. C. Barnett.)

this action? A. I was.

Same objection as last above.

Objection overruled. Exception.

Q. And who was in possession of it at the time you commenced this action?

A. Well, it was at the Dome City Bank, left there for safekeeping.

Q. That's in this precinct and Territory—the Dome City Bank is out here on Dome, in the Territory of Alaska? A. Yes, sir.

Q. And in the Fairbanks Precinct?

A. Yes, sir.

That's all.

Cross-examination.

(By Mr. HEILIG.)

Mrs. Barnett, when did you go to work for Mr. Tobin out there?

A. I think it was June, the fifteenth, 1908—or 1907.

Q. Well, which was it?

A. My bills will show.

Q. Well, just think a minute.

A. 1907, I think.

Q. You think you went to work for him June 15, 1907? A. I think I did.

Q. Where? A. At No. 20 Below Dome.

Q. That's what is known as the Niggerhead property?

A. Yes; I might be mistaken in the date, but—

Q. I want you to get it as near as you can, Mrs. Barnett. A. Yes, I think it was 1907.

(Testimony of Mrs. C. Barnett.)

Q. Well, very well, let it go at that; now, how long did you work there?

A. I worked there over a year.

Q. And when did you quit work there?

A. I quit work it seems to me in August of 1908.

Q. And what were you doing there?

A. I was cooking.

Q. For whom? A. For J. L. Tobin.

Q. Anybody else?

A. No, sir—O, yes, of course there was a mess-house there.

Q. Well, any other operator, I mean?

A. Well, at first when I went down there there was others there, but later it was just Mr. Tobin.

Q. Who was there went you went to work in June, 1907, as you have testified?

A. There was Otto Nemitz and Lindsay, I believe.

Q. You started to work for them?

A. No, Mr. Tobin had bought in there.

Q. So it was Tobin, Nemitz and Lindsay you commenced working for? A. Yes, sir.

Q. How long did you work there for the three of them?

Objected to as immaterial.

The COURT.—I don't know as it is very material, but she may answer. Objection overruled. Plaintiff excepts.

A. I think they were there about four or five months after I went there.

Q. (Mr. HEILIG.) And then, what became of

(Testimony of Mrs. C. Barnett.)

Nemitz and Lindsay?

A. Well, I believe they sold out or something.

Q. To whom?

Objected to as incompetent and immaterial and not proper cross-examination.

The COURT.—No—what they did, Mr. Heilig, I can't see that that would be material—the only thing bearing on the question of consideration would be whether the plaintiff worked for them or Tobin. Objection sustained. Defendant excepts.

Mr. HEILIG.—You say you quit in August of 1908? A. I think it was August, 1908.

Q. And when did you have a settlement then with Tobin for what you had done?

A. Well, in the spring—I had some money in the spring.

Q. Spring of 1908?

A. 1908; yes, and then later on in July he gave me the bill of sale of the nugget.

Q. Yes, but that's not what I asked you. I asked you when you had a final settlement with him?

A. I didn't have any final settlement with him—he just paid me some money and then—

Q. He paid you some money?

A. Yes, I think it was in May or 1908.

Q. How much did he pay you?

A. He paid me, I think, *it* the neighborhood of four or five hundred dollars somewhere.

Q. Was it four hundred, or five hundred, or in between? A. I think it was about five.

Q. And did he pay you any other money?

(Testimony of Mrs. C. Barnett.)

A. No, he didn't pay me any other money.

Q. And that's all he paid you for the work you did? A. Yes, sir.

Q. Well, you said in the spring of 1908 you had some money; what did you mean by that?

A. I mean he paid me some money along about May or June, I don't know which.

Q. And I believe you said a part of the consideration of this bill of sale was money you loaned him?

A. Well, I did loan him some money.

Q. When did you loan him some money?

A. I lent him some money in the winter of 1908, I think.

Q. That's after you say you bought this nugget?

A. No.

Q. Then, you are mistaken about a year?

A. O, I must be mistaken.

Q. Then, when do you think it was?

A. It must have been—you mean when I bought the nugget?

Q. No, when you loaned the money?

A. It was in 1908.

Q. What time of the year?

A. I think the winter time.

Q. Might have been in December, 1908?

A. I think it was in January or February.

Q. In January or February, 1908, how much did you lend him?

A. Well, I lent him different sums of money.

Q. How much?

A. I lent him, I think, in the neighborhood of

(Testimony of Mrs. C. Barnett.)

two hundred dollars at that time.

Q. When?

A. I think in the neighborhood of $200.00.

Q. Altogether? A. Yes.

Q. In January or February, 1908?

A. Yes; at least I know it was in the winter time.

Q. Now, did you work every day from the time you commenced on that claim until you quit?

A. No, I did not.

Q. How much time did you not work?

A. Well, I don't know just how much time I lost.

Q. Did you keep any record of the time you worked? A. Yes.

Q. What was that record?

A. Yes, my time was kept.

Q. Who kept your time?

A. The bookkeeper, whoever keeps the books down there.

Q. Did you have a book that you kept yourself?

A. Well, no, I did not.

Q. Now, then, do you know how much you earned during 1907? A. No, I can't tell offhand.

Q. Did you work all of the year 1907 from June 15th? A. No, I did not.

Q. When did you first quit work after you commenced there June 15, 1907?

A. I think I quit the following August, of 1908.

Q. What I'm trying to get at is, you say you didn't work all the time from the time you commenced until you quit?

A. Well, all but just a few days.

(Testimony of Mrs. C. Barnett.)

Q. What did you do during those few days?

Objected to as immaterial, irrelevant and not proper cross-examination.

The COURT.—(After argument.) That may be, but counsel has the right to show anything with reference to her transactions with Tobin to determine whether or not the sale was made in good faith. Objection overruled. Plaintiff excepts.

Mr. HEILIG.—Now, at the—as I understand it, at the time you commenced there June 15, 1907, up to the time you quit, you say in August, 1908, you worked nearly every day? A. Yes, sir.

Q. How much did you get a day?

A. Well, I had five dollars a day.

Q. And during all that time Tobin paid you say only five hundred dollars in May of 1908?

A. Yes, sir.

Q. And besides that you loaned him two hundred dollars in January or February, 1908?

A. Somewhere along in there, yes, sir.

Q. Did Mr. Tobin give you anything to show for this loan?

A. Well, I had some receipts—his notes—but in moving I have lost some of them.

Q. You don't have them now?

A. No, I don't.

Q. Did you look for them?

A. I looked for them; yes, sir.

Q. Now, when did you have a settlement with Mr. Tobin to find out what he owed you?

A. Well, when I had a settlement with Mr. Tobin

(Testimony of Mrs. C. Barnett.)

when I was leaving, that is before I left there. I had a settlement I think it was in July some time.

Q. Who figured out the amount that was coming to you? A. He did himself.

Q. Were you present? A. Yes, sir.

Q. Did you look over the books?

A. Yes, sir.

Q. And did you agree upon the number of days?

A. Yes, sir.

Q. Now, did he give you notes for the $200 you loaned?

A. The money was loaned at different times.

Q. About how many different times?

A. Three or four times.

Q. In small sums? A. Yes, sir.

Q. And did he give you a note for it each time?

A. I think so.

Q. When he paid you back did you give him the notes? A. No.

Q. Well, he didn't pay back the money he borrowed?

A. He paid me the five hundred dollars, in May.

Q. Was that paid on the loans?

A. Well, he paid for working, that was for wages and I still held the notes against him.

Q. You have them now?

A. I have some of them.

Q. Where are they?

A. I think I have some of them in my satchel.

Q. Are they here? A. Some of them are.

Q. Right here in the courtroom?

(Testimony of Mrs. C. Barnett.)

A. Yes, I think I have one right here in my satchel.

Q. Will you produce that? (Plaintiff's counsel hands handbag to witness. Witness hands paper to Court.)

The COURT.—Just hand them to Mr. Clegg, Mrs. Barnett. (Hands to her counsel.)

Mr. CLEGG.—That's a receipt, Mrs. Barnett.

A. Yes, sir, for my loan. (Paper handed to deft.'s. counsel.)

Mr. HEILIG.—You merely took a receipt for the loans? This is for money loaned to Mr. Tobin May 3, 1908—now, when did he pay you back?

A. It isn't paid back.

Q. And was any of this two hundred dollars you loaned him ever paid back?

A. No, it wasn't supposed—I didn't get any of that.

Q. Now, when you had a settlement in July one time, what did you include in that settlement, Mrs. Barnett?

A. Well, my wages settlement—I wasn't paid anything in July.

Q. I mean the account, the statement of account that was made; I understood by settlement that you meant you figured out how much he owed you?

A. Yes, sir.

Q. In July? A. Yes, sir.

Q. Now, how much did that figure up?

A. Well, I think somewhere in the neighborhood of twelve hundred dollars—something like that.

(Testimony of Mrs. C. Barnett.)

Q. Did you make it out on a sheet of paper?

A. He gave me a bill.

Q. What kind of a bill?

A. That is, he gave me—what would I say—a time check—due-bill.

Q. Where is that? A. I think that's home.

Q. Where—in your house? A. Yes.

Q. You didn't give that back to him?

A. No.

Q. Now, in that settlement of July, there was about $1200 due you, you say; in that settlement, that accounting, did you talk over the five hundred dollars he paid you in 1908?

A. Yes, I think that was taken off.

Q. You think you can find that statement do you, at your house? A. I think so.

Q. Have you a statement written out showing the number of days you worked and how much was coming to you and how much you loaned him?

A. Well, I don't know whether I have those notes or not.

Q. You think they may have been lost?

A. Yes, sir, I do.

Q. You're sure you didn't give them back to him?

A. No, sir, I did not.

Q. Now, when, about, in July was this settlement you say you had with Mr. Tobin?

A. Well, it was just before he gave me the bill of sale of the nugget.

Q. How long before?

A. I should say it was along in July about the

(Testimony of Mrs. C. Barnett.)

12th—some place along there.

Q. Do you remember the date of the bill of sale?

A. The date of the bill of sale?

Q. Yes.

A. I can't remember dates very well.

Q. Do you think you are correct about this date of July 12, 1908, when he owed you about twelve hundred dollars?

Objected to on the ground that the witness hasn't testified that was the extent of the indebtedness at that time.

The COURT.—I think she said at the time of the settlement it was approximately twelve hundred dollars—I don't recall whether she said the 12th of July.

Mr. HEILIG.—Your best recollection is it was about the 12th of July that you had the settlement with Tobin? A. Somewhere about there.

Q. So it was for this balance that was due you on that settlement that he gave you this bill of sale?

A. On my wages.

Q. Yes, balance due on wages?

A. Yes, sir.

Q. It wasn't for the $200 that you had loaned him and that he gave you notes for?

A. I don't know, maybe he included that in it too—I think he did include that in it.

Q. And you're quite sure the $500 he paid you in May was taken out?

A. O, yes, sir, that had been taken off.

Q. How did he pay you that?

A. I think he gave me checks.

(Testimony of Mrs. C. Barnett.)

Q. At the time he gave you this bill of sale, where was the nugget?

A. It was in the Dome City Bank for safekeeping.

Q. Had you seen it before then?

A. I had seen the nugget at different times; yes, sir.

Q. Where?

A. I had seen it on No. 1 Above; I don't remember having seen it after we left No. 1 Above but I saw it several times on No. 1 Above.

Q. You worked on No. 1 Above too?

A. Yes, sir.

Q. For Mr. Tobin? A. Yes, sir.

Q. You were there when he picked up this nugget? A. I was, yes, sir.

Q. Who found that nugget?

A. Well, I don't know whether it was Mr. Tobin or Mr. Miller Thostasen found it.

Q. Who was operating there at the time?

Objected to as immaterial, where the nugget came from.

The COURT.—No, that isn't material. Both parties claim under the same origin of title. Objection sustained.

Mr. HEILIG.—Do you know what Mr. Tobin did with the nugget after he found it?

Same objection, and further that it is not cross-examination.

The COURT.—She may answer.

Mr. CLEGG.—State if you know—we didn't go

(Testimony of Mrs. C. Barnett.)

into the subject merely because it was immaterial.

The COURT.—But you asked her if she knew anything about the claim of the Dome City Bank at the time she purchased the nugget and she said she did not, and it may be inquired under what circumstances or what arrangement the bank was holding it if she knows it was holding it.

Plaintiff excepts.

Mr. HEILIG.—Do you know what Mr. Tobin did with the nugget right after he found it?

A. Well, I think he kept it in his pocket and took it around and showed it to friends.

Q. How long did he do that?

Same objection.

A. I can't say.

Q. Then, what did he do with it?

The COURT.—Except as his dealings were with the bank I think that is immaterial.

Mr. HEILIG.—That is what I am trying to lead the witness to. After he had been showing it around to his friends where did he put it?

A. Why, he had it in his pocket one day and I said, "Ain't you rather careless carrying a valuable nugget like that around in your pocket like that," and he said, "I have thought so, and I'm going to take it to the bank and put it in a box for safekeeping at the Dome City Bank."

Q. Do you know what he did with that nugget?

Objected to as immaterial and not cross-examination.

Objection overruled. Exception.

(Testimony of Mrs. C. Barnett.)

Q. Do you know whether he put it in the Dome City Bank? A. He said he did.

Objected to as hearsay, and move that it be stricken.

The COURT.—That is competent—under what arrangements he deposited it if at all, is competent—on the other hand, it can't hurt anything to say that he didn't deposit it at the time. Objection overruled. Exception.

Mr. HEILIG.—Now, Mrs. Barnett, he kept it there about a month, didn't he?

Objected to as immaterial and leading.

A. I don't know.

The COURT.—(After argument.) She may answer; ascertain whether or not she knew whether there was any arrangement with the bank or what it was if she knows; if she doesn't know she can say so.

Mr. HEILIG.—Now; you remember, Mrs. Barnett, after he had it in the bank for a while he took it out again?

Same objection. Overruled. Exception.

A. No.

Q. You don't remember that?

A. I don't remember seeing it after he took it to the Dome City Bank.

Q. Do you remember seeing it at Thomas' store?

A. No, sir, I did not.

Same objection. Overruled. Exception.

Q. Did Mr. Tobin tell you he took it out of the Dome City Bank after that?

Objected to as incompetent, irrelevant and im-

(Testimony of Mrs. C. Barnett.)

material, hearsay, and leading.

Objection overruled. Exception.

Q. Did Mr. Tobin tell you that he took it out of the Dome City Bank? A. No, sir.

Same objection. Overruled.

Q. You know as a matter of fact that Mr. Tobin took the nugget even clear down to Fairbanks?

A. I don't know it as a fact.

Same objection—further, that this is not cross-examination.

The COURT.—I think anything the witness may know as to how the bank held the nugget is cross-examination; anything else is not competent. (After argument.) I think that is a part of your defense Mr. Heilig.

Exception.

Mr. HEILIG.—When did Mr. Tobin first show that receipt for the nugget?

A. I don't remember that.

Q. Try to think, and find out when you first saw the receipt for that nugget?

A. I don't remember when I first saw the receipt for it.

Q. Was it just before he gave you that bill of sale?

A. Why, I believe he showed me the receipt when he transferred the nugget to me.

Q. That was the time?

A. I believe that's when he showed me the receipt, maybe before that a few days; I can't say.

Q. Did you know where the nugget was at that

(Testimony of Mrs. C. Barnett.)

time? A. It was in the Dome City Bank.

Q. Did you make any inquiry from the Dome City Bank before you took the bill of sale in regard to that nugget?

A. No, I did not, none whatever. I took the nugget in good faith for my wages.

Q. Yes; that is, you didn't take the nugget, but you took the bill of sale? A. Yes, sir.

Q. The nugget, you say, was in the bank?

A. Yes, sir.

Q. How did you know at that time the nugget was in the bank?

A. Well, when I talked—when we talked about my wages with others that were there, I thought perhaps I might not get my wages and so I spoke to Mr. Tobin—and he had promised me before that he would always secure me so I would get my wages.

Q. But you say you never said anything about this blank—about this blank receipt or the nugget before you got the bill of sale?

A. No, I didn't ask for it; it wasn't mine then.

Q. Did you say anything about it at all?

A. No, sir.

Q. You didn't inquire from the bank whether Mr. Tobin owned the nugget at the time?

A. No; I supposed naturally as long as he gave me the bill of sale for it it belonged to him.

Q. Did you know at that time that he owed the bank a lot of money? A. No, sir, I did not.

Q. Then, why were you afraid you might not get your money?

(Testimony of Mrs. C. Barnett.)

A. Well, the clean-ups were coming along and the creditors were also coming in throngs.

Q. Was the bank one of the creditors thronging about there?

A. I didn't see any of the bank people at all.

Q. What creditors were they coming in throngs?

A. Well, the men that worked there were looking for their wages, of course.

Q. You say you didn't see any of the bank's people there?

A. No, sir; I don't remember seeing anybody.

Q. You knew that he owed the bank some money?

A. I didn't inquire into it at all—I didn't inquire into his business at all.

Q. Didn't he tell you so?

A. No, sir, he didn't tell me so.

Q. How did you find out about the other debts he owed?

A. Well, people came there looking for money when the clean-ups came along.

Q. So as soon as you got this bill of sale, then what did you do with it?

A. What did I do with the bill of sale?

Q. Yes.

A. Well, I had it for a few days, I think, before I called Miss Mulrooney up and asked her—told her that the nugget had been transferred to me—that I had bought the nugget.

Q. How long did you keep the bill of sale before that?

(Testimony of Mrs. C. Barnett.)

A. I think I had it a few days; I don't remember how long.

Q. Then what did you do with it?

A. I went up to the Dome City Bank with it.

Q. No—what did you do with the bill of sale, is what I am asking you now.

A. I still kept the bill of sale and went to the bank—

Q. Kept it in your possession. How long did you keep it in your possession?

A. Before I went to the bank?

Q. Well—yes? A. Just a few days.

Q. And then you say you went to the bank with it? A. Yes.

Q. And that's when you had the talk with Miss Mulrooney? A. Yes, sir.

Q. Who else was there at that time?

A. I think Mr. Noble was there; and I didn't see anybody except Mr. Noble and the baby, Miss Margaret Mulrooney.

Q. That is, Jesse Noble, Margaret and the baby?

A. Yes—that was Jesse Noble's baby.

Q. That's when you told Miss Mulrooney that you had a bill of sale for the nugget?

A. No, I called her up on the 'phone first.

Q. Well, you told her at that time also?

A. Yes, sir.

Q. Did you show her the bill of sale?

A. I couldn't over the 'phone.

Q. I mean at the bank when you saw the baby?

A. Yes, but she wouldn't look at it.

(Testimony of Mrs. C. Barnett.)

Q. Did you see the nugget then?

A. No, sir.

Q. Did you have the bill of sale with you?

A. I had.

Q. How long were you at the bank that time?

A. Oh, about five minutes, I should think.

Q. And then what did you do about it?

A. Well, I went over—she refused to give me the nugget then or to transfer it to me and I went over and got Mr. Coffer and took him with me and made a formal demand for the nugget and she refused.

Q. And then what did you do?

A. Well, there wasn't anything left for me to do but to go over to Cleveland's and eat my dinner and then I went to Ridgetop and from there to No. 20 Below.

Q. How long did you stay there?

Objected to as immaterial and not cross-examination.

The COURT.—That isn't material or important.

Mr. HEILIG.—And what did you do with the bill of sale after you had been there at the bank a couple of times?

Objected to as immaterial.

The COURT.—What is the purpose of the question, Mr. Heilig? I don't think it is material or makes any difference.

Mr. CLEGG.—Why, of course, he wants to show that the bill of sale was recorded.

The COURT.—I don't think that is material, whether it was or not—there is no question of con-

(Testimony of Mrs. C. Barnett.)

structive notice. The objection is sustained. Exception.

Mr. HEILIG.—After you failed to get the nugget, Mrs. Barnett, did you report that fact to Mr. Tobin? A. Yes, sir, I did.

Q. And what did he do about it?

Objected to as immaterial and not cross-examination.

Objection sustained. Exception.

Q. Did Mr. Tobin after that pay you any money on this account that he owed you?

A. No, sir.

Q. Has he up to this date paid you?

A. No, sir.

Q. Mr. Tobin has taken considerable interest in this case, hasn't he?

A. He hasn't taken enough interest to put up any money for me to fight it.

Q. You're doing that all yourself?

A. Yes, sir, I am.

Q. Has Mr. Tobin offered you any other security since he made that bill of sale for what he owed you?

Objected to as immaterial.

Objection sustained. Exception.

The COURT.—The question is, whether or not there was a bill of sale made in good faith at the time.

Mr. HEILIG.—Do you know who had the nugget at the time you were at the bank?

A. No, sir; I naturally supposed it was in the Dome City Bank since it was left there for safekeeping.

(Testimony of Mrs. C. Barnett.)

Q. Well, if you don't know I don't want you to guess. You don't know it was there?

A. Yes, sir, I do know it.

Q. How do you know it?

A. Well, I didn't see it in there, but I had a bill of sale of it and I had this deposit slip, and naturally supposed it would be in the bank just like a deposit of money.

Q. Wasn't it sent away long before that?

A. Not that I know of.

Q. You don't know as to that? It may have been? A. No, sir.

Objected to as immaterial.

Q. You didn't see it?

The COURT.—That may be material to show where the nugget was at the time—objection overruled. Exception.

Mr. HEILIG.—You didn't see it there, Mrs. Barnett, you say?

A. I asked them to give it to me and they refused; that's all I know about it.

Q. For all you know it was a thousand miles away from there at the time?

A. And for all I know it was in the safety box right there.

Q. Well, it might have been anywhere else? For all you know?

Objected to as immaterial. They have already admitted in their deposition that it was there.

Mr. HEILIG.—That's not in evidence yet.

The COURT.—She has testified that all she knew

(Testimony of Mrs. C. Barnett.)

about it she assumed it was there, from the evidence she had.

Mr. CLEGG.—And that's what Miss Mulrooney said about it's being there, according to the direct examination of this witness.

The COURT.—I think the objection should be sustained.

Exception.

Mr. HEILIG.—Now, you say you went up there to the bank the first time—the first time that you went to the bank, that you talked with Margaret Mulrooney?

A. Yes, I went up with the slip of deposit.

Q. And what did you say to her?

A. I asked her for the nugget, wanted her to transfer it to me.

Q. What nugget did you ask her for?

A. The nugget that was included in that bill of sale.

Q. Did you show her the bill of sale?

A. I offered to, and she wouldn't look at it.

Q. Now, what did she say?

A. She said that Tobin owed them, and that she didn't have to have a mortgage on the nugget, they could keep it as collateral, or something to that effect.

Q. Didn't she tell you at that time that she had taken it from Tobin and had given him credit for it?

A. No.

Q. Did she say anything of that kind?

A. No, sir, she refused to talk about it.

(Testimony of Mrs. C. Barnett.)

Q. Now, you say Mr. Noble was there?

A. He was around the place, yes.

Q. He was in the room?

A. He was out by the door, I think.

Q. He could hear what she said?

A. I don't know.

Q. And you swear that she, that Margaret didn't say she had taken it over from Tobin and given him credit?

A. Well, she said something about him owing them, but she said she would keep it.

Q. Did she say "I will keep it," or "we will"?

A. No, she said, "You can get all the bills of sale you want; we will keep it."

Q. You're sure she didn't tell you she had bought the nugget? A. No, sir, she did not.

Q. Didn't she say to you then that the bank had given him credit for the nugget on its books?

A. I didn't talk to her very much.

Q. Well, what's your recollection about her saying that?

A. I remember she said that Tobin owed them money, and she said, "I wish you would look at the books."

Q. Did you look at the books?

A. Not in particular.

Q. Did you look at them a little?

A. Not enough to tell what he owed.

Q. You found from the books, then, that he did owe the bank a lot of money?

A. No, sir, I did not.

(Testimony of Mrs. C. Barnett.)

Objected to as incompetent, irrelevant and immaterial and not cross-examination.

The COURT.—The only purpose, Mr. Clegg, is to show the conversation she had at the time, between the witness and Miss Mulrooney. That was brought out on your direct examination, and any part of that conversation, if there was any more of it, may be brought out on cross-examination.

Objection overruled. Exception.

Mr. HEILIG.—I think that's all.

Redirect Examination.

(By Mr. CLEGG.)

You say there was an actual existing indebtedness of about twelve hundred dollars from Tobin to you at the time you took this bill of sale?

A. Yes, sir, for work.

Q. Now, I wish you would show me that receipt again that Mr. Heilig asked you about, if you will please. (Witness hands paper to counsel.) Whose signature is that? A. J. L. Tobin's.

Q. You're acquainted with his signature?

A. Yes, sir.

Plaintiff offers the receipt in evidence and asks that it be marked Plaintiff's Exhibit No. 3.

No objection. So marked by the clerk.

Q. (After reading receipt in evidence.) Now, you say you—that you have other receipts of that same character?

A. Well, I'm not sure that I have now.

Q. You also sold Tobin a range, didn't you, prior to the 22d day of July, 1908?

(Testimony of Mrs. C. Barnett.)

A. I loaned him the money to buy a range.

Q. How much was that?

A. It was seventy-five dollars.

Q. And you had various transactions with him covering the period you were working there—how long were you working on No. 1?

A. I don't just remember.

Q. How many men did you cook for on No. 2?

A. I had from sixteen to eighteen and twenty men.

Q. The few days you testified on cross-examination by Mr. Heilig that you weren't working, you were in town, I presume? A. Yes, sir.

Q. And otherwise you were working continuously? A. Yes, sir.

Q. And you never received but the five hundred dollars in the spring of 1908—was it four or five hundred? A. I don't just remember.

Q. Have you the check for that?

A. I had two or three checks.

Q. Well, that amount was the only amount you received in payment of wages? A. Yes, sir.

Q. And he owed you considerable for money loaned in addition to that? A. Yes, sir.

Q. And you never had a settlement with him up until the time he gave you that bill of sale?

A. No, sir.

Q. Now, when you went up there to the Dome City Bank, didn't Miss Mulrooney tell you first that they had a mortgage?

Objected to as leading.

(Testimony of Mrs. C. Barnett.)

We're going into this question of other matters brought out on cross-examination. What did Miss Mulrooney say to you with reference to—when she replied to your question if they had a mortgage on the nugget?

Objected to as not redirect examination and repetition.

The COURT.—If there is anything that counsel wishes to bring out in particular—especially if it is in addition to what the witness stated on cross-examination. The objection is overruled. Exception.

Mr. CLEGG.—Did she show you a mortgage, or did you look at it? A. No, sir.

Q. Didn't she show you a document—a mortgage or some document of that kind?

A. Well, she showed me a note—

Mr. HEILIG.—Now, this is improper—this witness continuously, when I asked her a question, looked at her counsel, and I think it is improper to testify that way—this is a leading question.

Mr. CLEGG.—We object to insinuations of counsel and positively deny that the witness did anything of the kind.

Mr. HEILIG.—I don't mean to say counsel has influenced her but she is cautious, and she wouldn't answer until her counsel could object—

Mr. CLEGG.—That's what any witness ought to do.

Mr. HEILIG.—But I say for that reason counsel must not lead the witness.

The COURT.—That's true, Mr. Heilig; but a wit-

(Testimony of Mrs. C. Barnett.)

ness on the stand, particularly one without experience, may forget some particular thing, and while it is improper to ask leading questions I think it is proper to direct the witness' attention to some particular thing—

(Exception.)

Mr. CLEGG.—What took place at the time?

A. When I came up to the Dome City Bank?

Q. Yes, ma'am?

A. Well, I went to the window and Miss Mulrooney came and I told her that I came to get the nugget. I also had my bill of sale and the check—

Q. The deposit slip?

A. Yes, the deposit slip—yes; and she wouldn't look at it. "Well, no," she says, "Mr. Tobin owes us money and," she says, "We will keep the nugget." I says, "O, have you got a mortgage on it," and she says, "No, we don't need a mortgage on it; we can apply it as collateral," or some words to that effect.

Q. Well, did she show you any note at that time?

A. Yes, sir.

Q. Signed by whom, and what was said about it and for what purpose did she show it to you?

A. And I asked her if the nugget was included in the note or something to that effect, and she said this was a note that Mr. Tobin gave them.

Q. Was the nugget included in it?

A. No, sir.

Q. She said that—Miss Mulrooney did?

A. She said it wasn't, and she said, "We don't have to have it included."

(Testimony of Mrs. C. Barnett.)

Recross-examination.

(By Mr. HEILIG.)

You say this $75 you loaned for the range, that's the $75 you have the receipt for?

A. I don't know whether it is or not.

Q. Did you loan him an item of $75 before that, or after?

A. I loaned him several amounts.

Q. Smaller than seventy-five dollars?

A. Yes, sir.

Q. But you loaned him $75 to buy a range with, and that is the seventy-five dollars you have the receipt for? A. I don't know.

Q. Did you loan him seventy-five dollars at any other time?

A. I don't remember the amounts.

Q. Well, then, it is very likely it is, don't you think? A. I don't know.

Q. But altogether, when you had the settlement on the 12th of July, he owed you twelve hundred dollars?

A. I'm not sure of just the exact amount; I think probably he owed more than twelve hundred dollars at the time.

Q. Well, you had a settlement there, you said?

A. To a certain extent—I wasn't paid any money.

Q. Well, you figured out how much he was owing?

A. Yes, sir.

Q. And that figured up—after you figured up the money you loaned and he took off what he paid you, that left twelve hundred dollars, did it?

(Testimony of Mrs. C. Barnett.)

A. Yes, something like that—I don't remember just the exact amount.

That's all.

Mr. CLEGG.—That's all, Mrs. Barnett. Now, if the Court please, I would like to read those exhibits to the jury.

The COURT.—Very well.

Whereupon counsel read in evidence Plaintiff's Exhibits Nos. 1, 2 and 3, which are attached with their indorsements, to this record.

[Testimony of J. L. Tobin, for Plaintiff.]

J. L. TOBIN, witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. CLEGG.)

Your name is J. L. Tobin? A. Yes, sir.

Q. Where do you reside, Mr. Tobin?

A. Fairbanks at the present time.

Q. What is your occupation?

A. Miner.

Q. Are you acquainted with the plaintiff, Mrs. C. Barnett? A. Yes, sir.

Q. Now, I show you this instrument marked Plaintiff's Exhibit Number One, and ask you if that's your signature? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 2, and I ask you if you recognize what that is?

A. Yes, sir.

Q. Did you on the 22d day of July, 1908, own the nugget mentioned in this certificate of deposit?

(Testimony of J. L. Tobin.)

A. Yes, sir.

Defendant objects to the question and moves to strike the answer as a conclusion of the witness. The question of ownership is the sole issue in this case.

The COURT.—Well, at that particular time—I think that you are the owner of a piece of personal property may be stated as a fact—it is for you to rebut it. I can hardly see how else you are to prove ownership. (After argument.) To pursue the same course as required in the ownership of realty I don't see how you would ever get to the end of your string, especially if the property changes hands. In the case of real estate, you can go to its very origin, but in case of personal property suppose he testified that some other party transferred the nugget to him, it cannot certainly be claimed that he couldn't assert title without proving that his grantor owned it, and if you kept going back and tracing it up you would probably be as old as the nugget itself before you got to the end of it. He may testify that on a certain date he owned a certain piece of personal property —the same rule does not apply as in the case of real estate.

Objection overruled. Exception.

Mr. CLEGG.—The question was if you owned the property described in Plaintiff's Exhibit No. 2 on the 22d day of July, 1908? A. Yes, sir.

Q. Did you sell it at that time to Mrs. C. Barnett?

A. On or about that time.

Objected to as incompetent and immaterial.

The COURT.—That question can be best proven

(Testimony of J. L. Tobin.)

by the bill of sale itself, Mr. Clegg.

Mr. CLEGG.—Well, you executed that bill of sale? A. Yes, sir.

Q. What was the consideration passing from Mrs. Barnett to you for that transfer?

A. Well, the bill *O* owed her at the time, the figures I don't remember exactly.

Q. Well, about what amount was it?

A. Well, in the neighborhood of a thousand dollars.

Q. Have you any books to show what the state of your account with her was at that time?

A. Yes, sir.

Q. Where are those books?

A. Up here on Second street, at my cabin.

Q. Did you deposit this nugget with the Dome City Bank at any time? A. Yes, sir.

Q. When was that—on the 12th of June, 1907?

A. I don't remember the exact date, but on or about that time.

Q. And at that time you received this receipt for it? A. Yes, sir.

Q. Did you at any time thereafter, prior to the 22d day of July, 1908, part with your title to that property? A. No, sir.

That's all.

Cross-examination.

(By Mr. HEILIG.)

Mr. Tobin, when you first got hold of this nugget what did you do with it?

Objected to as not cross-examination, and material.

(Testimony of J. L. Tobin.)

The COURT.—What is the purpose of the question?

Mr. HEILIG.—We are going now into the inquiry to dispute this man's ownership of the nugget on July 22d.

The COURT.—Yes, I think anything in relation to that is proper cross-examination.

Mr. CLEGG.—Yes, but he is asking what he did with the nugget when he first got it.

The COURT.—I presume it is merely preliminary. Objection overruled. Plaintiff excepts.

Mr. HEILIG.—What did you do with the nugget when you got it?

A. I don't just remember—carried it around a few days, I guess.

Q. And then where did you put it?

A. I had it in the safe deposit in the Dome City Bank.

Q. When did you put it in the Dome City Bank the first time?

Objected to as immaterial.

Objection overruled. Exception.

A. I don't remember the date.

Q. Can you fix the date you left it there the first time?

Same objection and ruling.

The COURT.—(After argument.) He testifies that he was the owner of it, Mr. Clegg; anything concerning his dealings with the bank with reference to the matter is competent and cross-examination.

Plaintiff excepts.

(Testimony of J. L. Tobin.)

Mr. HEILIG.—Now, you say that after carrying it around a few days, you deposited it with the Dome City Bank? A. Yes.

Q. And when was that?

A. Why, I think some time in June, I don't remember the date.

Q. You dug it up in the spring of 1907?

A. Yes, sir.

Q. A little late in the spring, wasn't it?

A. Yes, sir, it came out of a dump washed out late in the spring of 1907.

Q. You had some trouble starting that spring on account of the strike?

Objected to as immaterial.

The COURT.—Yes, I think that is immaterial. I don't think it is material how he got the nugget, where, or when; but any dealings he had with the defendant with reference to it is material.

Mr. HEILIG.—You say you deposited it in the spring of 1907 with the bank?

A. Yes, to the best of my knowledge.

Q. And how long did you leave it there?

A. Well, it has been there ever since—or should be.

Q. Continuously?

A. No, it was out a few days.

Q. Who took it out? A. I did.

Q. When did you take it out?

A. Why, I don't remember what date—shortly afterwards.

Q. Well, a month afterwards?

(Testimony of J. L. Tobin.)

A. Why, it might have been two weeks or a month—maybe not a week; I don't remember.

Q. You can't remember how long you left it in the bank the first time?

A. No, I couldn't say as to how many days.

Q. You think it was about a month then?

A. No, I wouldn't say; I don't remember; it might have been a month and it might not have been more than a week.

Q. Well, you would say from a week to a month?

A. Well, to the best of my recollection some two or three weeks.

Q. Then, you took it away from the bank?

A. Yes, sir.

Q. And what did you do with it then?

A. I was coming to town and took it to town with me.

Q. What did you do with it in town?

A. I carried it around with me most of the time.

Q. How long did you stay in town?

A. I don't remember.

Q. You can't state how long you stayed in town?

Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Your bill of sale shows there was a transfer of this particular nugget, and Mr. Tobin states that he was the owner, and also that he deposited it with the defendant company. Anything that bears on that—how and when he deposited it, I think is competent. The jury wants to know all about that. Plaintiff excepts.

(Testimony of J. L. Tobin.)

Mr. HEILIG.—How long did you have it in Fairbanks? A. I don't remember.

Q. Well, would you say a week?

A. I don't expect I was here more than two or three days.

Q. You showed it around town pretty generally, I suppose? A. Yes, sir.

Q. You had it on exhibition in the stores?

A. No.

Q. Not at all? A. No.

Q. And in four or five days where did you go then?

A. I think I went back to Dome, to the best of my memory.

Q. And did you take the nugget with you?

A. Yes, sir.

Q. Carrying it around in your pocket all the time?

A. You mean while I was in town?

Q. Yes? A. Not all the time.

Q. Where did you keep it in town?

A. I left it, I think, over night—I don't know whether it was more that one night or not—at the Washington-Alaska Bank.

Q. After you got back to Dome—you mean Dome City?

A. Well, my place of business where I was mining there—and Dome City too, I expect.

Q. Where did you go after you left Fairbanks, down to the Niggerhead property, or to Dome City?

A. Well, I don't remember.

(Testimony of J. L. Tobin.)

Q. How did you go out?

A. I don't remember.

Q. Did you go out alone?

A. I couldn't say.

Q. Do you remember whether you walked or rode on the cars?

Objected to as immaterial and irrelevant.

The COURT.—I am willing for counsel to ask anything about his dealings with the defendant bank, but what he did about carrying the nugget around town is immaterial. (After argument.) I don't think it makes any difference how many people he exhibited it to or whether he walked, or rode, or went in an automobile. Objection sustained. Exception.

Mr. HEILIG.—Well, you got out to Dome Creek?

A. I think so.

Q. You're not quite sure of that, are you?

A. I don't remember—I must have got out there some time because I was working there afterwards.

Q. But you don't know when?

A. No, I don't remember.

Q. But some time after that you got out to Dome Creek again? A. Yes, sir.

Objected to as repetition.

The COURT.—Well, we have got him out on Dome Creek now.

Mr. HEILIG.—Where a witness displays a disposition to avoid a direct answer I think the cross-examination should be open.

The COURT.—Mr. Heilig, I think it is not fair

for counsel to comment on the witness until your closing argument—that is a matter entirely for the jury.

Mr. HEILIG.—One of the things a juror judges is by the demeanor of the witness on the stand.

The COURT.—I don't think so; at least during the trial counsel should not comment upon the demeanor of a witness for the purpose of exaggerating any of his peculiarities; and anything that he did in Fairbanks with that nugget or anywhere else with anybody else, unless it in some way negatives his testimony as to his transactions with the defendant bank, cannot be material.

Defendant excepts.

Mr. HEILIG.—After you got back to Dome Creek, what did you do with the nugget?

A. I don't just remember; eventually it was put back in the Dome City Bank.

Q. Can you tell when?

A. No, I couldn't say; I may have left it around about in Dome a day or two, or Mr. Thostasen may have had it a while—I don't remember whether I went back to Dome direct from Fairbanks or not.

Q. Did you have it for a time in Judge Thomas' office? A. I think I did.

Q. In Judge Thomas' safe in the store?

A. Yes, sir.

Q. For quite a while?

A. I think only a few days.

Q. Then where did you put it?

A. In the Dome City Bank.

(Testimony of J. L. Tobin.)

Q. You're quite sure it was for only a few days?

A. I know it was only a few days, to the best of my memory.

Q. Then where did you put it?

A. In the Dome City Bank.

Q. You can't tell us when that was when you put it in the Dome City Bank the second time?

A. No, I couldn't tell you what date.

Q. Didn't they give you a receipt for it at that time? A. Yes, sir.

Q. And that's the receipt you have testified to, is it?

A. I rather think it is the same one—it might have been a new one.

Q. Did they give you more than one receipt?

A. No, sir.

Q. Did they give you a receipt when you put it in there the first time?

A. They certainly did.

Q. Where is that receipt?

A. I guess it's here.

Q. Is this the receipt they gave you when you first put it in?

A. To the best of my knowledge.

Q. And where is the receipt they gave you the second time? A. That's it.

Q. Did they give it to you the second time?

A. I expect so; if I turned it back to them they probably turned it back to me when I delivered the nugget.

Q. When did you take it out the first time?

(Testimony of J. L. Tobin.)

A. I don't know the date.

Q. And the second time?

A. I don't remember the date.

Q. When you took it out of the bank and brought it to Fairbanks did they ask you for the receipt?

A. I don't remember whether they asked me or not.

Q. Were you present when the deposition of Margaret Mulrooney and Mrs. Carbonneau were taken?

Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

Objection sustained. Exception.

Q. Have you read their depositions?

A. Yes, sir.

Q. You know they testify they asked you for the receipt when they turned the nugget over to you?

A. I know that's what they said.

Q. You say that's false?

A. I do not—I don't remember whether they did or not.

Objected to as immaterial and not cross-examination and an attempt to impeach their own witnesses.

The COURT.—No, it goes to the question as to whether or not the receipt was delivered up when the nugget was taken out by the witness—I think it is competent.

Plaintiff excepts.

Mr. HEILIG.—Then you say they may have asked you for the receipt at the time they delivered you the nugget?

(Testimony of J. L. Tobin.)

A. They may have—I couldn't say.

Q. Do you swear now that you ever delivered up any receipt to them?

A. I certainly must have.

Q. Are you positive of that?

A. Yes, sir, to the best of my knowledge I certainly must have.

Q. You know that they testify in their deposition that they asked you for the receipt and you said you couldn't find it don't you?

Objected to as immaterial and incompetent.

The COURT.—In any event, it is not cross-examination. Every witness' testimony stands on its own merits. The jury can judge of that hereafter if counsel offers the depositions and it becomes admissible. It is not competent or good practice to ask one witness what he knows or thinks of another witness' testimony. Objection sustained.

Exception.

Mr. HEILIG.—Who delivered the nugget to you at the Dome City Bank, Mr. Tobin?

A. I don't remember—I expect the cashier.

Q. Did she at that time ask you for the receipt?

A. I don't remember.

Q. Did you at that time say to her that you couldn't find that receipt?

Objected to as immaterial and not cross-examination.

Objection overruled. Exception.

A. I don't remember whether she did or not, or

(Testimony of J. L. Tobin.)

whether I voluntarily gave it to her. I couldn't state.

Q. Did you at that time say to her you couldn't find it? A. I don't remember, sir.

Q. Did you at that time promise Margaret Mulrooney that when you found it you would turn it over to her?

A. I don't remember of saying anything of the kind.

Q. You had considerable transactions with the Dome City Bank, did you not? A. I did.

Q. Mostly with Margaret Mulrooney, the cashier? A. Why—no.

Q. With whom did you have your dealings?

A. Mrs. Carbonneau, who was supposed to be the manager of the Dome City Bank.

Q. At what time?

A. I think at that very time.

Q. This was in June, 1907?

A. About that; June or July.

Q. So you don't remember whether she asked you for the receipt?

A. If I had it I probably gave it to her.

Q. But you don't remember whether you told her you didn't have it, do you?

A. I don't just remember that.

Q. Now, the next time you deposited the nugget—left it there, were you not indebted at that time to the bank in a considerable sum?

Objected to as not cross-examination.

(Testimony of J. L. Tobin.)

The COURT.—Yes, I think his indebtedness to the bank, Mr. Clegg, is cross-examination. Any dealings he may have had with reference to this nugget with the bank, is cross-examination.

Plaintiff excepts.

Mr. HEILIG.—Did you at any time after you left the nugget at the bank the second time tell the cashier of the bank that you wanted to draw checks up to the amount of the nugget—up to the value of the nugget? A. No, sir.

Q. Did you say anything to that effect?

A. No, sir, there was never a word of any kind as to this nugget or drawing against it in any shape or manner.

Q. Not with anybody in the bank?

A. No, sir.

Q. Did you at any subsequent time, after you had deposited that nugget there the second time make any overdrafts upon the bank?

A. Why, I rather think I did some, yes, sir, some year or a year and a half afterwards, according to their figures, which I don't think are right.

Q. That would be in 1908?

A. That is, according to their figures.

Q. And you also borrowed money from the bank?

Objected to as immaterial and irrelevant, and not cross-examination.

The COURT.—Yes, I think that is not cross-examination. (After argument.) I would admit it if it bore directly on this case of the plaintiff. My idea of cross-examination is it should cover the same

(Testimony of J. L. Tobin.)

scope or be necessarily connected with the direct examination. Now, anything that is directly connected with this nugget or the dealings in connection with the nugget I will permit on cross-examination. But the fact that this man may have been indebted to the bank is not necessarily connected with any dealings he may have had with reference to the nugget. Our statute is explicit on that matter, Mr. Heilig, and permits anything on cross-examination that is directly connected with or is included within the scope of the direct examination. I think this is purely defensive matter, and, as counsel says, I don't think it is fair to endeavor to prove the case of the defendant by cross-examination of the plaintiff or her witnesses. The purpose of cross-examination, if it is invested with any purpose at all, is to weaken or explain the case of the plaintiff, but it is not supposed thereby to set up the case of the defendant. I don't think this evidence is competent. The objection is sustained. Exception. (After further argument.) This is a case of replevin dealing with the ownership of the property, and anything bearing upon the ownership of the nugget is competent.

Defendant excepts.

Mr. HEILIG.—At the time you deposited this nugget the second time I believe you said you were indebted to the bank?

The same objection is urged.

The COURT.—I think that has been ruled on, Mr. Heilig—objection sustained. Defendant excepts.

Mr. HEILIG.—After you deposited the nugget in

(Testimony of J. L. Tobin.)

the bank the second time, did you draw any checks on the bank in excess of the balance to your credit?

Same objection. Overruled.

After you deposited the nugget the second time in the bank, did you make any over-drafts on the bank?

Objected to as not the best evidence and not cross-examination.

The COURT.—Well, it may show whether or not he drew against the credit of the nugget—I will permit it.

Plaintiff excepts.

A. At that particular time?

Mr. HEILIG.—No, after you deposited the nugget the second time, Mr. Tobin?

A. I stated that some year or year and a half afterwards I probably did, according to their figures.

Q. You say a year or a year and a half afterwards? A. It must have been about that.

Q. Why, this was about July, August or September, 1907, that you deposited the nugget the second time, wasn't it?

A. It must have been in June—about then.

Q. The second time?

A. Yes, sir, to the best of my knowledge along about June.

Q. Wasn't that the first time?

A. Well, there was very little difference between the first time and the last; I don't know how many days.

Q. You were here in Fairbanks four or five days, and then it was in Judge Thomas' place?

(Testimony of J. L. Tobin.)

A. Well, I don't know whether I left it in Judge Thomas' place before I had it in the bank, I'm not sure—but I do remember of its being there.

Q. Now, after you—well, now, do you want to be understood as saying that it was a year and a half after that that you had made the first over-draft on the bank?

Same objection—not the best evidence and not cross-examination.

Objection overruled. Exception.

A. I don't remember the date how long it would have been afterwards, but it was quite some time I know. I'm speaking according to their figures now; I don't know that I ever had an over-draft with the Dome City Bank any time.

Q. You didn't?

A. I don't know that I had; this is their figures for it—I dare say I never had any.

Q. You had an account there?

A. Yes, sir.

Q. And had a pass-book issued to you?

A. Yes, sir.

Q. Well, now, I will show you a book, is that the pass-book you had? (Handing witness book.)

Objected to as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—He may identify the book—it doesn't become evidence until it is offered. Objection overruled.

Plaintiff excepts.

Mr. HEILIG.—Is that the pass-book?

(Testimony of J. L. Tobin.)

A. I don't know—it's my name all right.

Q. Did you have that in your possession?

Same objection and ruling. Exception.

A. Well, I don't know as I ever did—I may have.

Q. Well, did you have a pass-book from the bank?

A. Yes, but I'm not sure this is the one.

Q. When you made deposits at the bank you got credit?

A. I really think so, Mr. Heilig—I should.

Q. Well, just examine this and see.

A. (After examining.) I can't tell you from this; I have my own books.

Q. Did you ever have any other pass-book than that?

A. Well, I don't know whether that's the book or not.

Q. Did you have any other book?

Same objection and ruling. Exception.

A. I had one book, was all, the bank-book, similar to this—perhaps this is the same one.

Q. You think it is, don't you?

A. I can't say that it isn't and I can't say that it is.

Q. Did you keep any account yourself with the bank?

Objected to as immaterial and not cross-examination.

Objection sustained. Exception.

Q. Were you present in the bank with Mr. Miller

(Testimony of J. L. Tobin.)

Thostasen in July of 1908? A. In July?

Q. Or June?

A. I remember of seeing him in there, yes, sir; I don't say just when it was.

Q. Did you go down there with him?

A. To the bank?

Q. Yes. A. No, I did not.

Q. You met him there?

A. No, I went there first.

Q. You met him there?

A. He came a few minutes later.

Objected to as irrelevant and immaterial, and not cross-examination.

The COURT.—It may be preliminary to something that is material. Objection overruled. Plaintiff excepts.

Mr. HEILIG.—He wanted to get this nugget from you at that time, didn't he?

Same objection, and also it is leading.

The COURT.—I don't see that it is material.

Mr. HEILIG.—I want to show a conversation there. These are admissions of the grantor prior to the passing of the title to his grantee, which are always admissible, tending to show that the grantor had no title at the time he claims to have made the transfer.

Objected to as irrelevant and immaterial.

The COURT.—He makes the admission after he sold the nugget?

Mr. HEILIG.—No, no, before; afterwards he could not.

(Testimony of J. L. Tobin.)

The COURT.—How could he make an admission before the occurrence—how could he admit something as to a thing that didn't transpire until afterwards?

Mr. HEILIG.—Any admission or declaration by a grantor prior to his conveyance would be binding on the grantee claiming under it; and we should be permitted to show from the grantor's own testimony that he didn't own the property at the time he made the transfer.

The COURT.—If that is the purpose, it is an impeaching question and must be put the same as any other impeaching question. If he were a party to the suit it would be different, but an admission of his is no more than the admission of any other witness and the proper foundation should first be laid and the impeaching question put to him the same as any other witness. Unless that is done the objection must be sustained. (After further argument.)

Exception.

Mr. HEILIG.—I'll ask you to state, Mr. Tobin, whether or not—whether you did not state, on July 7th, 1908, in the Dome City Bank, in the presence of Mr. Miller Thostasen, Mrs. Carbonneau and Margaret Mulrooney, in answer to a question that Mr. Thoastasen propounded to you as to whether you could get the nugget, in substance, "I can't make it go, Miller; I can't get the nugget—it is here as security"?

A. Will you please state that question again?

Q. (Same question repeated.)

(Testimony of J. L. Tobin.)

A. No, I did not.

Q. Did you say anything in substance to that effect at that time?

A. No, sir, I didn't say anything myself. I went there for the nugget this particular day, I don't remember the date, to give it to Mr. Thostasen as some additional security to a mortgage he held on some chattels.

Q. Against you?

A. Yes, sir; that was about to be foreclosed. Shortly afterwards, maybe two or three weeks or a month, I don't remember. I wanted to get the nugget so he wouldn't foreclose this mortgage, and we made arrangements, I went to the bank for the nugget and they promised me that they would do better than that, that they would take the mortgage over themselves in a couple of weeks, they had some collections—

Q. Whose mortgage?

A. This Thostasen mortgage I have just spoken of. And I told them if they did so I would turn this nugget in as further security. Well, the time run on for two or three weeks, whatever it was to be that they were to take the mortgage over, but they didn't come through with the money or express any intention of doing so—and that's why I sold the nugget.

Q. Mr. Tobin, is it not a fact that on or about the 7th day of July, 1908, in the Dome City Bank, while you and Mr. Thostasen and Mrs. Carbonneau and Margaret Mulrooney were present, didn't you state you would like to turn this nugget over to the bank

(Testimony of J. L. Tobin.)

in order to stop the interest on an overdraft you had at the bank? A. No, sir.

Q. Anything in substance to that effect?

A. Not a word mentioned whatever of that kind.

Q. Is it not a fact that on the 7th day of July, 1908, in the Dome City Bank, in the presence of yourself and Mr. Thostasen and Mrs. Carbonneau, that after you stated you would like to turn the nugget over to the bank because it would stop the interest, Miss Mulrooney said to you: "Mr. Tobin, if you are in a hard place I will take the nugget and charge it to my account at $17.00 an ounce and that will stop the interest of the Dome City Bank and I won't charge you any interest? A. No, sir.

Q. Did you say anything to that effect?

A. No, sir.

Q. Nothing like it? A. No, sir.

Q. Mr. Tobin, is it not a fact that in September, 1907, you stated to Margaret Mulrooney, cashier of the Dome City Bank, that your account was going to be overdrawn and that the nugget was in the safe to secure the bank, and that you then asked her for the bank to honor your overdrafts or your checks up to the amount of the nugget? A. No, sir.

Q. Nothing of that kind? A. No, sir.

Q. You executed a note and mortgage to the bank, didn't you, in 1907?

Objected to as immaterial and irrelevant and not cross-examination.

The COURT.—Was the mortgage supposed to include and cover this nugget, Mr. Heilig?

(Testimony of J. L. Tobin.)

Mr. HEILIG.—No, sir.

The COURT.—It is not cross-examination. The objection will be sustained. Defendant excepts.

Mr. HEILIG.—No, but we will undertake to show that the real value of the nugget was applied upon the debt secured by the mortgage.

The COURT.—If that is true, I think it is your case and is clearly not cross-examination. Exception.

Mr. HEILIG.—Did you at any time go into the office of the Dome City Bank and look at the account that the bank was keeping with you?

Objected to as immaterial and incompetent, and not cross-examination.

Objection overruled. Exception.

Were the books shown to you at any time?

A. Not that I remember of.

Q. You had occasional settlements with the bank?

A. Never complete; never was settled up definitely at any time that I know of.

Q. There was always a balance in favor or against you?

A. Always in my favor, I guess, except the last; only their last figures to me showed an overdraft and, as I say, I don't think I owe them to-day.

Q. You mean to say you think you don't owe the bank? A. Yes, sir, certainly.

Q. You don't mean to say you don't think you did owe the bank at various times?

Objected to as incompetent, irrelevant and not

(Testimony of J. L. Tobin.)

cross-examination.

The COURT.—This is a private controversy between the witness and the bank. Objection sustained. Exception.

Q. (Mr. HEILIG.) Now, you gave a note to the bank on September 13th, 1907, for $3,710.00?

Same objection—overruled.

A. I don't remember what the date was.

Q. Can you refresh your memory? (Handing witness paper.) A. I guess that's right.

Q. What date is that?

Objected to as incompetent, irrelevant and immaterial and not the best evidence, and has nothing to do with this controversy in any manner.

The COURT.—Yes, I suppose the note will show for itself.

Mr. HEILIG.—I just asked you what the date of the note is—just answer as to the date.

A. September 13, 1907.

Q. Do you know when the bank afterwards gave you credit on that note?

Mr. CLEGG.—We object to all questions along that line on the same ground as last stated.

The COURT. (After argument.) The note hasn't been offered in evidence yet. It is always proper to identify a paper by the man who signed it when he is on the stand even though it is not cross-examination, (etc.). (After further argument.) Objection overruled.

Mr. HEILIG.—Now, Mr. Tobin, you know as a matter of fact that on the 7th day of July, 1908, that

(Testimony of J. L. Tobin.)

the bank gave you credit on that note for $1,283.16, the value of that nugget?

A. No, I do not, and I don't think they ever did unless it was lately.

Q. Don't you know whether on that day they gave you credit on your account with the bank for $1,283.16?

By the COURT.—What he knows about it now is immaterial. What he knew at that time is material, and if he knew at that time he may answer. His present knowledge, probably gained long after these transactions were closed, is absolutely immaterial. Exception.

Mr. HEILIG.—Did you ever make an agreement or have an understanding with the cashier of the Dome City Bank there on July 7, 1908, that the $1,283.16 should be placed to your credit for that nugget? A. No, sir, none whatever.

Q. Nothing of that nature? A. No, sir.

Q. Don't you know as a fact that on that date the bank did give you credit for $1,283.16 on your account? A. No, I do not.

Mr. CLEGG.—What date is that?

Mr. HEILIG.—July 7, 1908. Don't you know as a matter of fact that while you were in the bank on July 7, 1908, Margaret Mulrooney entered a credit of that amount on your account on their books?

A. No, sir.

Q. In your presence?

A. No, sir, nothing ever said about it—not a word of any kind, sir.

(Testimony of J. L. Tobin.)

Q. And your account never showed that credit?

Objected to as incompetent and immaterial and not the best evidence, not cross-examination and at best a self-serving declaration.

By the COURT.—Any account or statement he may have gotten since that time showing any such state of facts could not affect the plaintiff's title in the least. If it showed that he did get such credit and that he knew of it prior to the transfer of the property to the plaintiff, then it might make a difference. The mere fact that he saw a statement afterwards showing that he was credited on the books with the value of the nugget could not in *any affect* the plaintiff's title, because the bank could not acquire ownership in that manner without the plaintiff's consent or without the witness consented prior to the transfer to the plaintiff—he couldn't consent any time after the sale to the plaintiff. Exception.

Mr. HEILIG.—Now, do you swear positively you were never informed by any of the officers of the Dome City Bank prior to July 22d, 1908, that they had given you credit on your account for $1,283.16?

A. I don't think they did; no, sir.

Q. You don't think they did?

A. No, sir, I certainly do not.

Q. Did you at any time prior to July 22, 1908, consent with any of the officers of the bank that they should give you credit on your account with the bank with that amount?

A. I don't know that I ever owed the bank at the time.

(Testimony of J. L. Tobin.)

Q. You had given a note on September 13th, 1907, for $3,710? A. That was secured.

Q. Had you paid that note on July 22d, 1908?

A. They had a mortgage to cover that note.

Q. Then you hadn't paid it?

A. I don't know that I owed them in fact—I am taking their figures for that.

Q. Well, you hadn't paid the mortgage?

Objected to as immaterial and irrelevant.

The COURT.—It isn't competent, Mr. Heilig; the only reason I permitted it at the time is that he said he didn't owe them anything. Defendant excepts.

Mr. HEILIG:—You secured them by mortgage on some other property, did you? A. Yes, sir.

Q. I presume the Court will object to my going into what became of the other property?

The COURT.—Yes, sir; I am entirely satisfied it is not cross-examination and I am not sure it is even defensive matter at all. It could not in any way effect the title of this plaintiff, in any event. Defendant excepts.

Mr. HEILIG.—Mr. Tobin, in September, 1907, in the office of the Dome City Bank, while you and Margaret Mulrooney and Mrs. Carbonneau were present, did not Margaret Mulrooney ask you about your account and tell you what Mrs. Carboneay had said in regard to it, and did you not say in reply, "All right; as long as the nugget is in the safe."

A. No, I did not.

(Testimony of J. L. Tobin.)

Redirect Examination.

(By Mr. CLEGG.)

Mr. Tobin, you stated on cross-examination that you went to the bank several times and took the nugget out and afterwards returned it?

A. Yes, sir.

Q. Did you ever get it out without first delivering to the bank that receipt that you held?

A. I don't think I ever did.

Q. And when you took the nugget out you delivered up the receipt? A. Yes, sir.

Q. And that occurred several times?

A. Yes, sir; many times I have taken it up to Dome City and returned it the same day.

Q. And at the same time you never authorized Margaret Mulrooney or any officer of the Dome City Bank to apply this nugget or its value on any debt that you owed the Dome City Bank?

A. No, sir, I never did; I don't know that I owed them; all I go by is—

That's all. Now, the plaintiff offers in evidence the original answer in this case and the answer as amended on this date, for the purpose of showing the corrections made by the defendant on the date of the trial and ask that they be marked Plaintiff's Exhibits 4 and 5—perhaps copies should be substituted and marked.

The COURT.—Is there any objection?

Mr. HEILIG.—I don't see that there is any question about that.

The COURT.—The amendments were to be made or have been made by interlineation?

(Testimony of J. L. Tobin.)

Mr. HEILIG.—Yes, sir, I understand so—or were to be.

Mr. CLEGG.—I find there have been no amendments made to the answer.

Mr. HEILIG.—Well, I haven't had time to make them yet.

The COURT.—Very well; the amendments may be made by interlineation—it is understood what the amendments are to be. They may be received in evidence, and copies substituted and marked.

Plaintiff rests.

Court adjourned.

(Fairbanks, Alaska, February 11, 1910, 10 A. M.)

And be it further remembered: That thereafter and on the 11th day of February, 1910, and after the plaintiff had rested her cause, the defendant, to maintain the issues on its part, introduced the following evidence and the following proceedings were had, to wit:

The COURT.—I understand that the plaintiff rests?

Mr. CLEGG.—Yes, sir.

The COURT.—Very well—call your first witness, Mr. Heilig.

[Testimony of Jesse Noble, for Defendant.]

JESSE NOBLE, witness called on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. HEILIG.)

It is understood that I now call Mr. Noble merely

(Testimony of Jesse Noble.)

for temporary purposes. Mr. Noble, are you acquainted with Barbara A. Carbineau?

A. Yes, sir.

Q. Also with Margaret C. Mulrooney?

A. Yes, sir.

Q. Were you acquainted with them on the 14th day of November, 1908? A. I was.

Q. Were you present when their depositions were taken before E. T. Wolcott, Notary Public, in this case? A. Yes, sir, I was.

Q. Do you know where Barbara A. Carbineau is now?

A. She is in the State of Washington now.

Q. Do you know where Margaret C. Mulrooney is?

A. She *is the* same place—State of Washington.

Q. Do you know that shortly after these depositions were taken that both of those parties left the District of Alaska?

A. They left within a day or so after these depositions were taken.

Q. Those depositions were taken in shorthand by E. T. Wolcott? A. Yes, sir.

That's all for the present.

Mr. CLEGG.—No cross-examination.

Mr. HEILIG.—Let me have the deposition of Margaret C. Mulrooney. The defendant now offers in evidence the deposition of Margaret C. Mulrooney, taken on the 14th day of November, 1908, before E. T. Wolcott, a notary public, in the presence of Cecil H. Clegg, attorney for plaintiff, and James

Wickersham, attorney for the defendant, and filed in this court November 19th, 1908, and published on January 3, 1910.

Mr. CLEGG.—We have no objection to its introduction except the one that no diligence has been shown on the part of the defendant to secure the attendance of the person whose deposition is sought to be introduced.

The COURT.—As long as it is shown that they are that distance from the sitting of the Court, I think that complies with the statute. I don't think that it is requisite that they be brought here when it is shown that they are beyond the jurisdiction. Objection overruled. Plaintiff excepts.

Of course you understand, Mr. Clegg, that any portion of the deposition that is immaterial and which you don't admit, may be objected to.

Mr. CLEGG.—I was present at the taking of the depositions and won't object to any of the matters testified to there.

The COURT.—Very well, proceed.

[Defendant's Exhibit "A".]

[Deposition of Margaret Mulrooney, for Defendant.]

"MARGARET MULROONEY, after being first duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. State your name.

A. Margaret C. Mulrooney.

Q. You are going outside now to the States?

A. Yes.

Q. You will not be back until next spring?

(Deposition of Margaret Mulrooney.)

A. About the first of next April.

Q. You are the Margaret that the preceding witness spoke about? A. Yes, sir.

Q. What relation did you have to the Dome City Bank from June, 1907, to the present time?

A. I was cashier of the bank.

Q. Do you know J. L. Tobin? A. I do.

Q. Do you have any recollection of his having brought a nugget to the bank about June, 1907?

A. I have.

Q. Do you know the size of the nugget?

A. Yes. The nugget is 73 ounces and I think a little over. I am inclined to believe it is 73.68 ounces. I know it is not 74, but it is 73 ounces.

Q. Do you know at what value, if any, it was credited to his account?

A. I credited it to his account at $17.00 an ounce. That was the usual value of the dust from that claim.

Q. When this nugget was first brought to the bank in June, 1907, what was the arrangement concerning it?

A. When the nugget was brought to the bank in 1907, Tobin at that time had a large account with us, I think it would amount to about $17,000.00, and he said, 'I want you to put this away for me,' and I gave him a receipt for it for safekeeping at the time.

Q. How long did the nugget remain there under those conditions?

A. I can't tell the exact time, but I know that Mr. Tobin came in there several times and I was obliged to open the safe and give him the nugget to

(Deposition of Margaret Mulrooney.)

show to his friends. He had the receipt all the time. I asked him for it the first time he took it out, but he was in the habit of taking it out and showing it to his friends and giving it back again.

Q. Did he come and get the nugget any time and take it away? After he had deposited it there?

A. Yes, he took it away.

Q. About how long was that after it was first deposited?

A. I would say about a month or so after it was first deposited.

Q. Were you present when he got the nugget that time?

A. Oh, yes, I was present any time he took it out of the safe.

Q. What was the conversation at the time he took it away?

A. At the time he took it away I asked him for the receipt and Mrs. Carbonneau also asked him, said it would be better to leave the receipt. He looked in his vest pocket, and he said: 'I don't happen to have it right on me right now, but I will give it to you at any time.'

Q. When did the nugget next get back to the bank?

A. It must have been the latter part of August, because his account was running low then, or the first part of September.

Q. What did he do with the nugget when he brought it back?

A. When he brought it back I asked Mrs. Carbon-

(Deposition of Margaret Mulrooney.)

neau what she thought was advisable as his account was running low and he was paying off for the wood with heavy checks, and I didn't think his account should be overdrawn. Mrs. Carbonneau said she had talked with Tobin and to let him continue to draw against his account and to honor his checks to the value of the nugget.

Q. Was that done? A. Yes, sir.

Q. Relate the circumstances.

A. Miller Thostasen had a mortgage against Tobin and he said he was going to foreclose. Mr. Tobin didn't want him to foreclose because it would shut down the works and he wanted to have a chance to take out the ground that season as he felt he could pay off all his debts if he could do so. He evidently had made some arrangement—

Mr. WICKERSHAM.—Q. Tell what you heard and saw yourself.

A. Miller Thosteson and Mrs. Carbonneau and Mr. Tobin and myself were in the office. Miller asked him if he could get the nugget. Tobin said: 'I can't make it go, Miller; I can't get the nugget. It is here as security.' And Mr. Thosteson then left the office.

Q. When was it left there as security?

A. In September.

Q. In September previous? A. Yes, sir.

Q. In September, 1907?

A. In September, 1907.

Q. Relate the circumstances of what occurred at the time he left it there as security?

(Deposition of Margaret Mulrooney.)

A. He continued checking on his account as usual, and when it was overdrawn we called his attention to it, and he gave us additional security.

Q. Of what? A. Wood and horses.

Q. What was said in relation to the nugget at any time about putting it up as security, if anything, prior to the time Mr. Thosteson was there?

A. Well, it was always an understanding at the bank with Tobin that the nugget was left there as security and we would honor his checks on the strength of the nugget being in the safe.

Q. Mr. Tobin was told that? A. Yes, sir.

Q. Who told him?

A. I told him and Mrs. Carbonneau told him.

Q. Coming down to the day Miller Thosteson was there with him, just relate as nearly as you can the conversations that were had at that time?

A. When Mr. Thosteson was in the bank?

Q. Yes.

A. Mr. Tobin had mentioned to Mr. Thosteson that he would like to turn over the nugget to him because it would stop the interest, and I was listening to the conversation, and I said: 'Mr. Tobin, if you are in a hard place I will take the nugget and charge it to my account at $17.00 an ounce, and that will stop the interest to the Dome City Bank, and I won't charge you any interest.'

Q. What did he say?

A. Tobin said to me: 'If I ever get the money I will come around and try and get it from you.'

Q. Did he consent to your taking the nugget and

(Deposition of Margaret Mulrooney.)

crediting his account?

A. Yes, he did; he consented to it.

Q. Was his account credited with the amount of it?

A. His account was credited on July 7, 1908, with $1,283.16.

Q. On the bank-books?

A. On the bank-books, and in Tobin's bank-book.

Q. Explain what you mean by 'in Tobin's bank-book.'

A. Tobin's bank-book was overdrawn on the Dome City Bank, and I gave him credit on his account, in the sum of $1,283.16.

Q. Was it a little bank-book that he carried?

A. It was a little bank-book that he carried in his pocket.

Q. Was that book delivered to him at the time?

A. His book was in the office, and he told me to enter his checks in it and to rebalance his account.

Q. Was that done? A. That was done.

Q. He understood at the time that that was done?

A. He understood. There was an undertaking right there. I was just doing it as an accommodation to Mr. Tobin to stop his paying interest.

Q. Miller Thosteson was present when this conversation took place?

A. Miller Thosteson was present when the conversation took place.

Q. Who else was present?

A. Mrs. Carbonneau.

Q. And you? A. And I.

(Deposition of Margaret Mulrooney.)

Q. Mr. Noble wasn't present, was he?

A. No, Mr. Noble wasn't present.

Q. Was there ever any other nugget in the bank belonging to Mr. Tobin than this one?

A. No. I remember once that Mr. Tobin had a picture of some nuggets taken, but they were never in the possession of the bank. He took the picture outside of the bank.

Q. This is the only business dealing the bank ever had with him in relation to a nugget?

A. Yes, sir.

Q. Or you or Mrs. Carbonneau personally either?

A. That is the only business dealing any of us had with him in relation to it.

Q. Do you know about this suit brought against the bank? A. Yes, sir.

Q. Have you seen the papers?

A. Yes, I have seen the papers.

Q. The complaint? A. The complaint.

Q. Is that complaint brought by Mrs. Barnett to recover this same nugget you have been talking about? A. Yes, the same nugget.

Mr. WICKERSHAM.—That is all.

Cross-examination.

(By Mr. CLEGG.)

Q. You are a sister of Mrs. Carbonneau, who just testified? A. Yes, sir.

Q. You were cashier of the Dome City Bank during this time, were you? A. Yes, sir.

Q. During all the time you have testified to concerning these transactions? A. Yes, sir.

(Deposition of Margaret Mulrooney.)

Q. I understood you to say that the first time this nugget was left for security was in September, 1907?

A. September, 1907, on or about, as well as I can remember. His account was running low about September. That is when we asked for additional security.

Q. What took place at that time with reference to his placing this nugget as security?

A. Mr. Tobin said that his account was going to be overdrawn but that the nugget was in the safe to assure us, to secure us, and that we could honor his checks up to the amount of the nugget.

Q. Who was present when that took place?

A. I believe I was the only one present at that conversation between Tobin and myself. He had also had a conversation with Mrs. Carbonneau, because he told me about it previous to that time.

Q. Was his account overdrawn at that time, in September, 1907? A. Yes, sir.

Q. Are you able to state how much?

A. I think I allowed him to overdraw to about $3,000.

Q. Do you know on what date this mortgage was given to the bank?

A. I don't remember the exact date, but it was in the month of September.

Q. Was that mortgage given to the bank or to you personally? A. It was given to the bank.

Q. Is it on record? A. Yes, sir.

Q. Do you know who executed it on the part of the bank? A. Who executed the mortgage?

(Deposition of Margaret Mulrooney.)

Q. Yes? A. I did.

Q. The nugget was in your possession at the time this mortgage was drawn? A. Yes, sir.

Q. It was not included in it? A. No.

Q. You say it was the same month that you asked for additional security?

A. Yes. The nugget was left there previous to the drawing up of this mortgage.

Q. It was the same month that you asked for additional security? A. Yes, sir.

Q. And after the execution of the mortgage?

A. Yes.

Q. What had Mr. Tobin done between the time the mortgage was executed and the time you asked for additional security to diminish his account?

A. He gave us the mortgage on some wood and horses.

Q. Had he overdrawn his account after he had executed the mortgage?

A. No. Previous to the time he executed the mortgage he had overdrawn his account.

Q. Didn't you have any conversation with him about this nugget at the time this mortgage was executed? A. No, I didn't.

Q. You never mentioned that among his assets?

A. No, because it was in the safe and he had drawn against it and it was just as good as sold to us at the time because we are not in the habit of taking any bills of sale for dust or nuggets or anything of that kind.

(Deposition of Margaret Mulrooney.)

Q. He had drawn against the nugget prior to that time?

A. Yes, he had drawn against the nugget prior to that time.

Q. How much had he drawn against it prior to that time?

A. He had drawn, I think, about thirteen or fourteen hundred dollars, and the nugget was only credited for $1,283.16, and Mr. Tobin had always valued his nugget at about $1,500.

Q. When did you say he was given credit for this $1,283.16 on the books of the bank and the bank-book of Mr. Tobin? A. On July 7, 1908.

Q. That was nine months after this transaction in September, 1907? A. Yes.

Q. On July 9th, you say? A. On July 7th.

Q. You are sure it was not in June?

A. No, it was not in June, because I made the entry myself.

Q. When did this conversation take place in which Mr. Thosteson and Mr. Tobin were concerned?

A. That was on or about July 7th, 1908, because I immediately made the entry on my books after the conversation.

Q. If Mrs. Carbonneau stated that it was in June, that was an error, was it?

A. That was an error.

Q. You testified in direct examination, as I understood you, that Mrs. Carbonneau told you in June or July, 1908, that it was all right to advance some more money to Mr. Tobin because you still had that

(Deposition of Margaret Mulrooney.)

nugget in the safe, and he could draw up to that amount?

A. It was either August or September, 1907, that Mrs. Carbonneau said it would be all right.

Q. How much was allowed him after that?

A. After that he was allowed up to $3,000. Later on in the season, in the spring of 1908, Tobin deposited his dust at the Dome City Bank and he checked out and occasionally there would appear an overdraft but he would cover it again with some dust, and we allowed him to go on until finally there was a little more due us, and he left that overdraft to too, which is not secured.

Q. The first time you permitted him to draw against this nugget was when Mrs. Carbonneau told you to let him do this? A. Yes.

Q. In September? A. In September, 1907.

Q. Did Tobin ever authorize you to do that?

A. Yes, Tobin did.

Q. How did it happen?

A. Tobin was in the office and I asked him about his account and told him what Mrs. Carbonneau had said. He said, 'It is all right as long as the nugget is in the safe.'

Q. Tobin said that? A. Yes.

Q. Did you act upon that after that?

A. I did.

Q. To what amount did he overdraw, then, or draw against the nugget?

A. Against the nugget?

Q. Yes.

(Deposition of Margaret Mulrooney.)

A. In the neighborhood of $1,300 that he drew against the nugget.

Q. I can't understand why there was any necessity for any further authorization from Tobin in June, 1908?

A. Well, I will tell you. Mr. Tobin had taken out the nugget, which was the largest nugget in the Tanana, and he wanted to always be in a position—or if he was ever in a position to take it, that we would give it to him.

Q. Did he ever authorize you to keep this nugget and ask you to permit him to check against it in June, 1908? A. In 1907.

Q. Did he also in June, 1908?

A. In June, 1908, when his account was overdrawn, he said: 'You take the nugget and apply it to my account.'

Q. He had already drawn to the full value of the nugget in September, 1907, had he not?

A. Yes.

Q. Then, he authorized you the second time, in June, 1908, to keep the nugget and give him credit for its value?

A. I don't catch what you mean.

Q. Did he authorize you in June, 1908, to retain the nugget as the property of the bank, allowing him credit for its full value?

A. Allowing him credit, yes.

Q. Was that done again in June, 1908?

A. Yes, that was done in June, 1908. I didn't give a credit in 1907. He issued checks against his

(Deposition of Margaret Mulrooney.)

account when it was overdrawn. The nugget was in the safe, and I didn't give him a credit in 1907; but in 1908, when he didn't pick up his account, he was in the office and didn't want to pay interest any longer on it, and I charged the nugget to my account and gave him the credit then.

Q. You charged it to your individual account?

A. Yes.

Q. Not the account of the bank? A. No.

Q. That was in June, 1908? A. Yes.

Q. So you assumed responsibility for the nugget in that month? A. Yes.

Q. What consideration did you give the bank for it? A. $1,283.16.

Q. Out of your account?

A. Out of my account.

Q. You know Mrs. Barnett; the plaintiff in this case? A. Yes.

Q. She called upon you in reference to this nugget on Dome on or about the latter part of July?

A. Yes.

Q. Of this year? A. Yes.

Q. And demanded it of the bank?

A. Demanded it of the bank, yes.

Q. Who was present at that time?

A. I was.

Q. Was Mr. Coffer present?

A. Yes, Mr. Coffer was present.

Q. And Mrs. Barnett?

A. And Mrs. Barnett.

Q. Anybody else? A. I don't remember.

(Deposition of Margaret Mulrooney.)

Q. Did you at that time state to her that the nugget was in the possession of the bank and that the bank had a note from Tobin, and that Tobin owed the bank money? A. Yes.

Q. And that you thought this nugget was included in this mortgage, and after looking the mortgage over you said it was not.

A. I said that the nugget was there as security, and that Mr. Tobin or Mrs. Barnett if they would pay the value of the nugget could have it.

Q. Did you tell her at that time that you claimed the nugget?

A. No, I did not, because she was free to pick it up from me then just as well as from the bank.

Q. Did you have it in your possession at that time? A. What time?

Q. When you had this conversation with her?

A. I don't remember exactly the date I had the conversation with her, but about July 7th was when I had it in my possession.

Q. This was on or about anywhere in the latter part of July. Was it there at the time she asked for it? A. Was it in the bank?

Q. Yes.

A. It may have been in the bank.

Q. Or under your control? A. Yes, it was.

Q. When the writ of replevin was served upon you on the 6th day of August by Mr. Frank C. Wiseman, Deputy United States Marshal, did you state to him at that time that the nugget in question and called for in the Writ of Replevin had been turned

(Deposition of Margaret Mulrooney.)

over to you, assigned to you on the 7th day of July, 1908? A. Yes, sir.

Q. And that you had turned it over to Mrs. Carbonneau? A. Yes, sir.

Q. When was it sent out to Seattle?

A. In September, 1908.

Q. Sent out as money of the bank or personal property? A. Personal property.

Q. Your personal property?

A. Personal property belonging to me.

Mr. CLEGG.—That is all.

Redirect Examination.

(By Mr. WICKERSHAM.)

Is that all, Miss Mulrooney, that you know of that is important in relation to the nugget, that you want to relate?

A. I called Mr. Tobin when this Writ of Replevin was served and he said: 'What could a fellow do in such a fix as I was?' He was in Fairbanks at the time. That was his conversation over the 'phone. He said: 'I will see that nothing comes of it.'

Q. Is that all?

A. That is all I remember."

Mr. HEILIG.—Then follows the certificate of the notary. We will call Judge Thomas.

[Testimony of George Thomas, for Defendant.]

GEORGE THOMAS, witness called on behalf of the defense, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. HEILIG.)

Mr. Thomas, where do you live? A. Dome.

Q. How long have you lived there?

A. October, 1905.

Q. Continuously since that time? A. Yes.

Q. What has been your business there?

A. General merchandise.

Q. Any other position or occupation held by you?

A. I run the Bonnifield Bank there, and I was Commissioner and part of the time postmaster.

Q. You know J. L. Tobin? A. Yes, sir.

Q. Mrs. Carbonneau? A. Yes, sir.

Q. Margaret C. Mulrooney? A. Yes, sir.

Q. And Jesse Noble? A. Yes, sir.

Q. What bank is located in Dome City and was at that time?

A. Well, at the present time it is the Dome City; formerly there was the Washington-Alaska and the Bonnifield banks.

Q. The Dome City Bank was there in 1907 and 1908? A. Yes, sir.

Q. Did you ever see a certain large nugget that Mr. Tobin dug up on No. 1 on Dome?

A. Yes, sir.

Q. Do you know where it was taken after it had been dug out? A. Immediately after; no, sir.

(Testimony of George Thomas.)

Q. Well, shortly afterwards?

A. Well, I don't remember the first time I saw that nugget, Mr. Heilig, but anywhere from two weeks to a month after it was taken out it was put in my store.

Q. Do you know where it had been prior to that time?

A. I may have seen it in the Dome City Bank, and I may not; I'm not certain as to that, Mr. Heilig.

Q. Can you tell from anything Mr. Tobin stated where it had been prior to that time?

Objected to as immaterial and hearsay.

The COURT.—I think it is, unless the question was put to Mr. Tobin. Of course it may be preliminary—I will permit it.

Plaintiff excepts.

A. I don't know that Mr. Tobin ever told me, Mr. Heilig; what I know about it would be in a general way.

Q. You say about a month after it was dug out it was brought to your place?

A. Well, it would be from two weeks to a month; I was handling a great deal of dust at the time, and while that was an unusually large nugget, still it does not fix the date in my mind; it was some little time after the nugget was taken out that it was in my place.

Q. How long was it in your possession?

A. Well, that would be in the same way. It was I would say, from two weeks to a month, I am quite sure it was out of my possession at one time during

(Testimony of George Thomas.)

the time it was kept in my safe.

Q. It was taken away by whom?

A. Mr. Tobin.

Q. And returned to you again? A. Yes.

Q. Was that done several times?

A. Well, I'm quite positive it was done at least once. And it may have been more frequently because there was people in and out there, O, you might say every day, to look at the nugget on account of the size of it.

Q. You kept it for safekeeping for Mr. Tobin?

A. Yes, sir.

Q. And what—state what Mr. Tobin did during the time it was in your possession in regard to calling for it and exhibiting it?

A. Any time he came in and asked for it and wanted to show it to anybody, either myself or the bookkeeper at the time would hand it to him. I don't think we ever gave a receipt for it, either in taking it out or when it came back.

Q. Do you know whether during that time Mr. Tobin took it to Fairbanks?

A. I couldn't say, Mr. Heilig.

Q. How long a time, to the best of your recollection, did he keep it in his possession after it had been brought to your place?

A. Well, since this case has been called up I tried to recall to mind more particularly about the nugget, and I remember of only one instance of going to the safe when the Tobin nugget wasn't there and I says to the bookkeeper: "Where is the Tobin nugget?"

(Testimony of George Thomas.)

Object, and move to strike any conversation with the bookkeeper. Motion sustained. Exception.

Q. Well, how long was it gone out of your possession at that time?

A. O, it would only be a matter of two or three days probably. On those things—I'm not clear as to dates, Mr. Heilig.

Q. But Mr. Tobin finally took it away from your place? A. Yes.

Q. Do you know where he put it?

A. Personally, no; I don't.

Q. Did you ever see it after that?

A. I don't know that I did.

Q. Did Mr. Tobin, at any time after he took it away from your place tell you where he had placed it?

Objected to as hearsay.

The COURT.—It is hearsay, and I don't see any materiality in the evidence at this time. Defendant excepts.

Mr. HEILIG.—That's all.

Cross-examination.

(By Mr. CLEGG.)

Judge, you say you never issued a receipt for this nugget? A. I don't think so.

Q. So it was left there entirely at Tobin's own risk?

A. Yes, that would be practically it.

That's all.

Redirect Examination.

(By Mr. HEILIG.)

I think you testified you were manager for the

(Testimony of George Thomas.)

First National Bank there?

A. It was the Bonnifield Bank, but Mr. Bonnifield was president of the First National.

That's all.

The COURT.—That is all, Mr. Thomas.

[Testimony of Jesse Noble, for Defendant.]

JESSE NOBLE, witness called on behalf of defendant, having been heretofore first duly sworn, testified as follows on

Direct Examination.

(By Mr. HEILIG.)

Give your name to the stenographer, please.

A. Jesse Noble.

Q. What connection have you with the Dome City Bank?

A. I am manager and President.

Q. What connection did you have with it in 1907?

A. Why, I didn't have no connection with it myself until about, I think, the 25th day of November, 1907.

Q. Were you interested in the bank prior to that time?

A. Not in 1907; I was earlier than that. And then I sold out of the bank and then I bought in again.

Q. You bought back again? A. Yes, sir.

Q. When did you again become connected with the bank?

A. On the 25th day of November, 1907.

Q. Have you been connected with it ever since

(Testimony of Jesse Noble.)

that time? A. Yes, sir.

Q. Were you in Dome City during the year 1907?

A. Why, part of the summer I was there.

Q. When did you leave?

A. I went out in the winter of 1906 outside and then I came in some time in June, I believe—if I remember the dates right.

Q. From June until November, 1907, were you in Dome City? A. Yes, sir.

Q. Most of the time?

A. Yes, sir; most of the time.

Q. Now, where were you in 1908?

A. I were in Dome City.

Q. Continuously? A. Sir?

Q. I say, continuously?

A. Yes, sir—that is, occasionally I was away on the creeks.

Q. Those were just short intermissions?

A. Yes, sir.

Q. From the time you became connected with the bank on November, 1907, up to the present time, how much of the time did you spend in the bank?

A. Since I became connected with the bank?

Q. Yes, sir.

A. Why, most of my time, only when I was away on business.

Q. Have you ever seen the books of account kept by the bank? A. Yes, sir.

Q. You can identify them? A. Yes, sir.

Q. How long have you known J. L. Tobin?

A. Why, a little over four years, I believe.

(Testimony of Jesse Noble.)

Q. Did you have any business transactions with Mr. Tobin during that time? A. Yes, sir.

Q. Of what nature?

A. O, in different ways; he has done a great deal of business in the bank and given mortgages and such things as that.

Q. What was the character of his business with the bank in a general way?

A. Well, his character of business was principally in making loans and such as that.

Q. Did he deposit gold-dust with the bank?

A. Yes, sir, we handled a great deal of dust for him.

Q. And he borrowed money from the bank?

A. Yes, sir.

Q. Had he an account with the bank in 1907 and 1908?

A. He had an account in the bank up until the first of September, 1907—probably not quite so late as that—he had a check account there—deposit.

Q. Did he have any account after that?

A. Well, only in a general way, when he would leave dust and check it out again.

Q. He had an account with the bank in 1908?

A. Yes, sir.

Q. Do you know anything about this nugget that is in controversy in this action?

A. Yes, sir; I do.

Q. When did you first see that nugget?

A. That was in June, the latter part of June, when I first came in from the outside, 1907.

(Testimony of Jesse Noble.)

Q. Where did you first see it?

A. Dome City.

Q. Whereabouts?

A. The first time I saw it I believe was in the bank, the first time.

Q. The Dome City Bank? A. Yes, sir.

Q. Do you know how long it remained there at that time?

A. Why, I can't tell exactly how long it remained; I know it was there a while after that time, a short time.

Q. Do you know anything about the fact of Mr. Tobin's taking it out of the bank?

A. Yes, sir; I do.

Q. Were you present at the time?

A. No, sir; not at the time of his taking it out.

Q. That is, the first time?

A. The first time.

Q. Do you know anything about the fact of his bringing it back to the bank?

A. Yes, sir, I do.

Q. Do you know anything about a receipt which the bank issued to him the first time?

A. Yes, sir, I do.

Q. What do you know about that?

A. I know that he had taken the nugget out and they had spoke to me about the receipt.

Objected to as immaterial, unless it is confined to the time when the witness was connected with the bank, and confined to knowledge he acquired at that time.

(Testimony of Jesse Noble.)

By the COURT.—I don't think it makes any difference whether he was connected with the bank, but it does make a difference whether it was personal knowledge or hearsay.

Mr. HEILIG.—How did you acquire the knowledge in regard to his taking the nugget out and bringing it back, and with reference to the receipt in evidence?

A. Why, I acquired my knowledge through Mr. Tobin, and also through people in the bank.

Q. From statements made to you by Mr. Tobin?

A. Yes, sir.

Q. When?

A. That was a short time after he had taken the nugget out the first time.

Q. Do you know what he did with the nugget when he took it out the first time?

A. Well, he told me to show it down here—one time.

Q. In Fairbanks? A. Yes, sir.

Q. And what did he say to you, if anything, in regard to that receipt?

Objected to as hearsay, and no foundation laid.

The COURT.—Unless the proper foundation is laid, it is not competent any more than it would be with any other witness. If the question is intended for the purpose of impeachment, the necessary foundation should be laid.

Mr. HEILIG.—Of course we take a different position from the Court in that regard. *x x x* The admissions of the grantor during the time he claims

(Testimony of Jesse Noble.)

to have been the owner of the property and prior to his conveyance, are admissible as against persons claiming under him, and it is not a question of impeachment at all.

The COURT.—(After argument.) It is certainly impeaching testimony when the witness Tobin says that at the time he transferred the property to the plaintiff he was the owner. Now, any statement he made inconsistent with that is an impeaching statement, and I do not see why the rule of the statute does not strictly apply.

Mr. HEILIG.—We are not undertaking to impeach Mr. Tobin by showing that at other times he made statements inconsistent with his present testimony. We are undertaking to impeach the testimony that he gave in chief by contradicting the testimony as to title and tending to show that he did not own the property at the time of the purported conveyance.

The COURT.—(After reading section of Alaska Code.) The reason of that rule is obvious. A witness is not supposed to be impeached unless he has a chance to answer whether or not he made such and such statements; then if he did he had a chance to explain them. But clearly if he made such statements as you are contending for now they are inconsistent and contradictory to the statements he now makes to the effect that at the time he made the sale of the nugget to the plaintiff he was the owner. *x x x* I realize that if the plaintiff had made the statements, it would be different because then it

(Testimony of Jesse Noble.)

would be equivalent to an admission against interest which is always competent. *x x x* Objection sustained. Defendant excepts.

Mr. HEILIG.—Now, at the time you talked with Mr. Tobin in reference to the receipt, were you connected with the bank? A. Yes, sir.

Q. Can you tell about what time that was?

A. That was in, I think October, if I remember right.

Q. October of 1907?

A. Yes—no, in 1906, this conversation—in 1908 I should say.

Q. October of 1908? A. Yes, sir.

Q. That was after this bill of sale testified to in this case was executed.

A. Yes, sir; after it was executed.

Q. Did you talk to him prior to the time this bill of sale was executed on the 22d of July, 1908, in regard to this receipt?

Objected to as incompetent, irrelevant and immaterial.

The COURT.—It may be preliminary. Objection overruled.

Plaintiff excepts.

A. Yes, sir; I had.

Q. Were you at that time connected with the bank? A. Yes, sir.

Q. What did you say to him in regard to that receipt?

Same objection.

The COURT.—The same ruling—objection sus-

(Testimony of Jesse Noble.)

tained. Exception.

Mr. HEILIG.—What did he say to you in regard to that receipt when you talked with him about it prior to July 22, 1908?

Same objection, and on the further ground that it is not binding on the plaintiff, and not material to the issues in this case.

The COURT.—Was this at the time it was placed in the bank?

Mr. HEILIG.—No, it was prior to the execution of the bill of sale.

The COURT.—I will permit it. I doubt very seriously whether it is competent—I cautioned counsel last night about the rule, but the other witness is in the courtroom and I will permit it.

Mr. HEILIG.—The Court will understand me—

The COURT.—Yes, but I stated last night, Mr. Heilig, very clearly that questions of an impeaching nature should be put to Tobin while he was on the stand.

Mr. HEILIG.—Well, of course we differ from the Court, and are just trying to make our record.

Objection overruled. Plaintiff excepts.

Q. Now, any conversation you had with Mr. Tobin prior to July 22, 1908, when he spoke of the receipt, what did he say?

A. Well, I told him they was complaining about the receipt and he stated he had lost it.

Q. Who was complaining?

A. The cashier of the bank. And he stated he couldn't find it and he guessed he had lost it.

(Testimony of Jesse Noble.)

Q. Did you have more than one conversation with him prior to the making of the bill of sale?

A. Yes, I saw him shortly after she had purchased the nugget from him, and we talked about—

Objected to as incompetent, irrelevant and immaterial and hearsay, and move the answer be stricken.

The COURT.—Were you present when the nugget was purchased? A. No, sir; I was not.

The COURT.—The answer may be stricken as hearsay.

Defendant excepts.

Mr. HEILIG.—What knowledge have you of the fact that Margaret Mulrooney purchased the nugget from Tobin?

A. I have the knowledge of the books of account kept in the bank, from her, and also from Mr. Tobin.

Q. What did Mr. Tobin state to you, if anything, in regard to selling the nugget to the bank prior to this bill of sale?

The same objection, and on further ground that the witness testified the sale was to Margaret Mulrooney, not the bank.

Objection overruled. Exception.

A. Why, it was always understood that Mr. Tobin, in our conversations, that he didn't care to lose the nugget, and while he didn't care to sell it outright and he wanted a chance to redeem it, it was in the safe and he said it was all right as long as he had the receipt for it.

Objected to and plaintiff moves to strike the answer, on the ground it is not responsive.

(Testimony of Jesse Noble.)

The COURT.—The question is not what was always understood—that's for the jury to say. You answer the question as to what was said, and the jury will be the judges as to what was understood.

A. You want to know what he said himself?

Q. Yes, sir; nothing else.

Mr. HEILIG.—What did Mr. Tobin say, if anything, to you prior to July 22, 1908, in regard to selling that nugget to Margaret Mulrooney?

A. Mr. Tobin told me that she had taken the nugget and had give the bank credit—she had give the bank credit for the price of it, and there was a further conversation there—

Q. Well, *ago* ahead and state what it was.

A. He said he had satisfied the claim, that much of his account at the bank and wanted to know if he couldn't draw some more money now since he had turned that in and got it straightened up.

Mr. HEILIG.—We would like to have the deposition of Margaret Mulrooney marked as an exhibit.

Marked as follows: No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Defendant's Exhibit "A." Filed in Open Court, Feb. 11, 1910, Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

Q. I call your attention now to a certain book labelled "Cash," and ask you to state whether you know whose property that is? A. Yes, sir.

Q. What is it?

A. It's the Dome City Bank's property.

(Testimony of Jesse Noble.)

Q. Was that the property of the Dome City Bank during 1907 and 1908? A. Yes, sir.

Q. What use was made by the Dome City Bank of this book during those years?

A. Why, this is the cash entry—cash-book.

Q. What entries were made in that book by the Dome City Bank?

A. Why, the cash entries, of loans and such things as that—accounts.

Q. I call your attention—is that the regular book of entry for that purpose kept by the bank in the ordinary course of business during the years 1907 and 1908?

A. Yes, sir; it might not be all of 1907—it might, we can—(after examination) yes, it is too.

Q. Do you know who made the entries appearing on pages—double page 103? A. Yes, sir.

Q. In whose handwriting is that?

A. Margaret Mulrooney.

Q. What position did she occupy in the bank at the time those entries were made on those pages?

A. Cashier of the Dome City Bank.

Q. The entries on that page were made at what time—during what year?

A. Entries made on this page, made July 7th, 1908.

Q. And you say they were made by Margaret Mulrooney as cashier of the bank?

A. Yes, sir.

Q. In the ordinary course of business?

A. Yes, sir.

(Testimony of Jesse Noble.)

Q. What item do you find on page 103 relative to the transfer or the transactions with J. L. Tobin with reference to the nugget in controversy?

A. I see where he is credited with $1,283.16.

Q. Just read the words—

Mr. CLEGG.—What's that answer?

A. It is credited to his loan, "J. L. Tobin, sold nugget, $1,283.16."

Q. Yes.

By Mr. HEILIG.—And that's on the debit side of the account? A. Yes, sir.

Q. And what is on the credit side of the account?

A. The credit side of the account is—

Q. What date is that? A. July 7th, 1908.

Q. What else? A. M. C. Mulrooney.

Q. No, this is the item here—just strike that out. Now this is the item here. A. Yes, I know.

Q. Read that.

A. "Margaret Mulrooney, T. D."

Q. And the amount? A. $1,283.16.

Q. That's all of that entry? A. Yes, sir.

Defendant offers in evidence p. 103—double page 103 of the book testified to and identified by the defendant, with the request that in view of the fact that they are regular books of the bank and the necessity of their presence in the bank and the inconvenience to the public from having them out of the bank that the clerk make copies of the pages offered and substitute them for the originals at the earliest moment possible.

No objection.

(Testimony of Jesse Noble.)

The COURT.—Very well, let the clerk make certified copy of the double page No. 103 and substitute it in the record as Defendant's Exhibit "B."

(Copy attached to this record.)

Mr. HEILIG.—I now ask that the jury look at the cash-book at the item marked in blue pencil for convenience. (Book exhibited to jury.) Mr. Noble, on the credit side of this page offered in evidence after the name "Margaret Mulrooney" appear the initials T. D. Will you explain to what that refers?

A. That is a credit, I think.

Q. What is that abbreviation for, can you tell at this time?

A. Credit T. D. is meant for credit there, as I have got it in my head now.

Q. I call your attention to—you say those books were kept by the cashier? A. Yes, sir.

Q. Now, I call your attention to this other book—

Object to calling the witness' attention to any item in there until it is identified.

We are going to ask the witness in regard to it. I show you now another large book and ask you whose property that is? A. Dome City Bank's.

Q. What is the book?

A. This is the loan item.

Q. Kept by the bank in the ordinary course of business? A. Yes, sir.

Q. How do you come into possession of it at this time?

A. I brought it in from the bank—had it brought in.

(Testimony of Jesse Noble.)

Q. Is it necessary for public convenience that it be returned as soon as possible? A. Yes, sir.

Q. Now, I call your attention to page 129 of this book and ask you whose account appears upon page 129—whose name is that account in?

A. Margaret Mulrooney.

Q. What does it purport to be—in whose handwriting were those entries made?

A. Margaret Mulrooney's.

Q. At the time those entries were made what position did she occupy in the bank?

A. Cashier.

Q. And she kept the books all the time?

A. Yes, sir.

Q. I ask you to state what the nature of the account was that was kept there, will you explain that?

A. The time deposit she had over here in the bank.

Q. Does that account contain item with reference to the transactions with Mr. Tobin?

A. Yes, sir; it does.

Q. With reference to the nugget?

A. Yes, sir.

Q. Just state what item appears upon that account.

A. It shows that she has charged herself with the same amount.

Q. What amount?

A. The amount of $1,293.16.

Q. On what date? A. July 7th, 1908.

Q. That's enough for that. We now offer page

(Testimony of Jesse Noble.)

129 of this book in evidence and ask that a copy be made thereof to be substituted in the record by the clerk.

No objection.

The COURT.—It may be admitted, and certified copy substituted in the record as Defendant's Exhibit "C."

Mr. HEILIG.—Now, then, I call your attention to page 150 of the same book and ask you in whose handwriting the entries on this page are?

A. Margaret Mulrooney's.

Q. Made in the ordinary course of business?

A. Yes, sir.

Q. I'll ask you whether or not on page 150 appears an item in reference to J. L. Tobin in connection with the transaction in regard to the nugget?

A. Yes, sir.

Q. What is that item—up here (indicating)?

A. It is where he is credited with the amount of the nugget.

Q. How much? A. $1,283.16.

Q. On what date? A. July 7th, 1908.

Defendant offers in evidence p. 150 of the same book with the same request as to copy.

The COURT.—It may be admitted and copy substituted in the record as Defendant's Exhibit "D."

(Book handed to jury for examination.)

Mr. HEILIG.—Did the bank during the time that Mr. Tobin did business with the bank also have a book which they gave to him showing deposits—amounts charged up and credited to him?

(Testimony of Jesse Noble.)

A. Yes, sir.

Q. You heard the testimony of Margaret Mulrooney in regard to making entries in Tobin's bank-book? A. Yes, sir.

Q. Do you know what that had reference to?

A. That was his pass-book.

Q. Do you know where that is?

A. Yes, sir; it is here.

Q. Can you identify it? A. Yes, sir.

Q. I hand you now a little book, and ask you what that is? A. J. L. Tobin's bank-book.

Q. Is that a book that was carried by Mr. Tobin?

A. Yes, sir.

Q. Will you explain to the jury how you happen to be in possession of it at this time?

A. It was left by Mr. Tobin—left in the bank.

Q. Do you know when?

A. Yes, the last time that—it's been in the bank ever since July, the time this nugget was turned over.

Q. Do you know why it was left there by Mr. Tobin? A. Left there to be balanced.

Q. Was it balanced? A. Yes, sir.

Q. Why, was it not returned to him after it was balanced? A. He hasn't called for it since.

Q. Has he spoke about it since?

A. Yes, he spoke about it.

Q. What did he say?

A. Well, he spoke about it when he was in town; I told him to send out and get it, and he said he was in a hurry and he wanted me to get some matters from it *in which* he wished to know immediately.

(Testimony of Jesse Noble.)

Q. Did you do that? A. Yes, sir.

Q. And the book was left and remained in the bank ever since it was balanced? A. Yes, sir.

Q. Who balanced the book?

A. Margaret Mulrooney.

Q. In whose handwriting are the entries?

A. Margaret Mulrooney's.

Q. The entries were made at the time they bear date—I say were they made at the time they bear date? A. Yes, sir.

Q. In the ordinary course of business?

A. Yes, sir.

Defendant offers the book in evidence.

No objection.

The COURT.—It may be admitted and exhibited to the jury.

Mr. HEILIG.—Now, if the Court please, this is the property of Mr. Tobin and it is evidence valuable to him against the bank and of course should not be kept from his possession if he desires to have it. We don't want to offer it as an exhibit to remain as a permanent record in the court, and therefore if counsel has no objection we will offer just certain pages of it.

Mr. CLEGG.—It has already been offered, the whole book, and received in evidence and we object to it being withdrawn. We rather have it in court than in the Dome City Bank.

The COURT.—Let it be admitted and marked.

Marked by clerk, Defendant's Exhibit "E," and hereto attached.

(Testimony of Jesse Noble.)

Mr. HEILIG.—I will ask the Court to look at the data I show to the jury (handing pass-book to Court) and call especial attention to the items at the bottom of that page. (Book handed to jury for examination.)

Now, Mr. Noble, after Margaret Mulrooney took over that nugget, what claim if any did the bank make to it?

A. Didn't make any claim to it.

Q. As far as the bank was concerned, whose property was it after the 7th of July, 1908?

A. Well, as far as I know it belonged to Margaret Mulrooney.

Q. And you always regarded it as hers since that time? A. Yes, sir.

Q. State whether the bank as a bank had possession of that nugget at the time this action was commenced? A. No, sir, it did not.

Cross-examination.

(By Mr. CLEGG.)

You had no relationship with the bank as an officer at the time the nugget was deposited there?

A. Yes, I believe I was acting as president, although I had no interest in the bank at that time.

Q. You weren't out there pretending to conduct that bank during the month of June, 1907, were you Mr. Noble?

A. No, I wasn't there all the month of June, 1907.

Q. You don't know anything about the bank issuing a receipt to Tobin for that nugget about the 12th of June?

(Testimony of Jesse Noble.)

A. No, I wasn't there at the time.

Q. Did you ever see that receipt before?

A. That's the first I seen of it—yesterday.

Q. That's Miss Mulrooney's signature isn't it?

A. It is.

Q. And she was cashier at that time?

A. Yes, sir.

Q. And she continued to be up until the 7th of July or the 22d of July, 1908, she was cashier of the Dome City Bank? A. Yes, sir.

Q. And probably up to the time she left Fairbanks?

A. Yes, sir, that's the time—

Q. In November?

A. November 13th, if I remember right.

Q. Of the year 1908? A. Yes, sir.

Q. Could you state to the jury, Mr. Noble, with any degree of certainty when you had this conversation with Tobin that you testified to on direct examination in which he made a statement to you about this receipt? A. Yes, sir.

Q. When? A. It was some time in July.

Q. Of what year? A. Of 1908.

Q. 1908? How was it, prior to the 22d or subsequent?

A. Yes, I would judge it was about the 11th of July.

Q. Where were you at the time?

A. I was in Fairbanks.

Q. In Fairbanks town here? A. Yes, sir.

Q. Whereabouts in town here?

(Testimony of Jesse Noble.)

A. Right across by the Washington-Alaska Bank.

Q. Outside of the bank, on the street?

A. Yes, sir.

Q. Mr. Tobin was there, was he?

A. Yes, sir.

Q. Who else?

A. Nobody else present at the time.

Q. How do you recall it was the 11th?

A. Well, since this transaction has taken place I remember I was in town at the time *this taken* place at the bank, and I knew nothing about it until Mr. Tobin came to me on the street and told me about it.

Q. How did the conversation spring up?

A. He came and told me and said what he did with the nugget and that he had lightened his account that much and wanted some more money.

Q. What did he say he had done with the nugget?

A. He said Margaret *Mulrooney taken* it.

Q. And wanted to know if you would give him some more money? A. Yes, sir.

Q. He owed you a lot at that time you claim?

A. Yes, sir.

Q. You would be very likely, I suppose, to advance him some more money if he hadn't paid what he owed?

A. That was the trouble—he was still owing.

Q. So if the nugget was applied to his account that wouldn't square his account?

A. Well, it would only satisfy a certain amount, of course.

Q. Well, it wasn't enough to be any inducement

(Testimony of Jesse Noble.)

to the bank to loan him more money?

A. I didn't feel that way about it.

Q. Well, as a matter of fact you did advance him more?

A. No, sir, I think one little overdraft occurred since that time is all.

Q. The bank has had a great many transactions with Tobin since the 7th day of July, 1907, up until the 22d of July, 1908, hasn't it? A. Yes, sir.

Q. On the 13th of September, 1907, Tobin executed a mortgage to the bank to secure a note for $4,480.00?

A. That was part of the security figured in it.

Q. And on the 3d of December, 1907, he executed another mortgage to the bank—a chattel and real mortgage? A. What year do you mean?

Q. 1907?

A. Yes, sir, I think about that date—13th or 17th.

Q. That $4,480.00 note was executed in October—the 23d of October, 1906, wasn't it?

A. Well, there might have been one at that time; but there was one I was thinking it was in 1907.

Q. Well, now, I'm coming to that; on June 12th, 1907, he executed a mortgage to the bank to secure a note for $3,180.00?

A. I wouldn't be positive without looking it up—it might be.

Q. And on the 13th of September, 1907, he executed a real and chattel mortgage to the bank or at least a chattel mortgage on 800 cords of wood and on the Nigger-head Association and on two horses—is

(Testimony of Jesse Noble.)

that right? A. Yes, sir.

The COURT.—What date was that?

A. September 13th, 1907.

Mr. CLEGG.—Then on December 3d, 1907, did he execute any more papers after that time?

A. I think there was a bill of sale given for some of the mortgaged stuff afterwards.

Q. Didn't he assign you a mortgage he held at that time? A. I meant the mortgage.

Q. Yes—he assigned to the bank a mortgage?

A. Not to my knowledge.

Q. When did you see that nugget last, Mr. Noble?

A. Why, I couldn't state the exact date of it, but I saw it I believe the same month, July—some time along there and I saw it before that—saw it several times as far as that goes.

Q. You mean July of 1908?

A. Yes, sir, I believe I saw it that month.

Q. Probably around about the time the negotiations were taking place between the bank and Tobin on July 7th?

A. I probably seen it during that time.

Q. Was it in the bank at that time?

A. It was in the bank up to the time Margaret Mulrooney purchased it.

Q. What became of it afterwards?

A. I think *she taken* it away, I don't know.

Q. Where did she put it?

A. She might have put it in the safe, and maybe sent it to town, I don't know.

Q. You heard her testimony read where she said

(Testimony of Jesse Noble.)

it was in her possession and under her control at that time?

A. Yes, sir, and on that account I paid no attention.

Q. All I want to know is, if you know where it was at that time, Mr. Noble?

A. No, I didn't state it was in her possession anyway.

Q. Then, the last time you saw it was about July 7th?

A. No, I didn't say that; I don't think I saw it after this *transaction taken* place.

Q. Which transaction?

A. With Mr. Tobin and Margaret Mulrooney.

Q. You didn't see it after that time, but you did see it some time in July?

A. I wouldn't be positive as to dates.

Q. Did Margaret Mulrooney give any receipt to the bank when she took it away? A. No, sir.

Q. So the records of the bank don't show anything as to what disposition was made of that nugget? A. Yes, the records do.

Q. Where?

A. In his account he got credit for it.

Q. Yes, that shows what was done with the value of the nugget, but the records of the bank don't show what disposition was made of the nugget itself.

A. Certainly, it does.

Q. Well, what do they show? Show me where the records indicate anything as to who got that nugget?

(Testimony of Jesse Noble.)

A. It shows where she charged herself with the amount and credited the bank to her account.

Q. Is that all you know about it? A. No.

Q. What else do you know?

A. What Mr. Tobin—

Q. What he told you?

A. Yes, he said she purchased it.

Q. Did he say she had taken it?

A. Well, I don't know; she said she had taken it on the account.

Q. There is nothing in your records to show where that nugget went to, is there?

A. No, sir.

Q. The bank, I understood you to say, relinquished all claim to this nugget after July 7th?

A. Yes, sir; I paid no more attention to it at all.

Q. And after that time the bank always regarded the nugget as the property of Margaret C. Mulrooney? A. Yes, sir.

Q. Now, I wish you would refer to that page 103 of the cash-book, Mr. Noble, and state what is that right-hand side—no the left-hand side at least, what do those items show there?

A. You mean all those items?

Q. Yes, what do they represent?

A. Those are deposits.

Q. No, here—this is the cash-book?

A. Yes, sir.

Q. That's the first book introduced in evidence, your cash-book—at the top of page 103 now what does that indicate these items on this page?

(Testimony of Jesse Noble.)

A. Those indicate credits.

Q. Credits?

A. Yes, sir, as I understand it—I'm not a practical bookkeeper myself.

Q. Well, you can tell what it means, can't you?

A. Yes, sir, by studying it out.

Q. Does that mean the bank paid out that much money that day?

A. No, this is money coming in.

Q. Money coming in?

A. No, this is money paid out.

Q. Are you sure about that?

A. That's the way I have it now; I'm not a bookkeeper myself.

Objected to on the ground that he has stated he is not a bookkeeper and there are gentlemen on the jury who understand books. These are bank-books, and there is a specialty in keeping that kind of books.

The COURT. (After argument.) I think it is competent evidence. He was asked on direct examination as to certain items appearing in the books and he testified what they showed, and these pages were offered in evidence. The objection will be overruled. Defendant excepts.

Mr. CLEGG.—Now, we have got down that far, to that item there of July 7th, loan—that means cash paid out—that the bank paid out?

A. No, this is credit here for money—yes, that's paid out, what was paid out as I understand it.

Q. Who does it say it was paid to there?

A. It says here there is $1,283.16 paid to J. L.

(Testimony of Jesse Noble.)

Tobin for nugget.

Q. Where does it say that? A. Right here.

Q. It says "J. L. Tobin, sold nugget"?

A. Yes, sir.

Q. That's written away out there in the margin a long distance from the other entries, is it not?

A. I don't see as it is.

Q. Do you know who wrote that?

A. Margaret Mulrooney's handwriting.

Q. Is that the same writing as that?

A. Yes, sir.

Q. The very same?

A. Yes, sir, to my knowledge it is.

Q. Now, what do you find on the other side that you testified about—about here say—"Margaret Mulrooney"? A. Yes, sir, Mulrooney.

Q. "T. D., $1283.16"? A. Yes.

Q. Now, what does that mean?

A. That's a credit, I presume.

Q. She gets credit for that on the bank's books, does she?

A. No, she gives the bank credit for it.

Q. What for?

A. Of course, I can't explain books as I should.

Q. What for? Does it show there what for?

A. No, it doesn't say what it's for, but it gives credit there for $1,283.16.

Q. To Margaret Mulrooney?

Objected to as not the best evidence. To any intelligent person these books are absolutely clear.

The COURT.—That may be, but you asked the

(Testimony of Jesse Noble.)

witness what they meant, these very items, and I think counsel has the right to cross-examine fully.

Mr. HEILIG.—Merely what they had reference to; I didn't undertake to go into the principles of bookkeeping.

The COURT.—The witness is merely asked what the books show.

A. This is a credit, as I understand it, to Margaret Mulrooney.

Mr. CLEGG.—Yes, sir; now what does "T. D." stand for? A. Time Deposit, I presume.

Q. You're not sure about that, however?

A. No, I'm not exactly sure.

Q. Now, this page 129 of the Ledger that you called your loan book in your testimony—the second book introduced on the part of the defense, it says there, "Mulrooney, Margaret, Time Deposit"?

A. Yes, sir.

Q. Whose writing is that?

A. Margaret Mulrooney's.

Q. Well, what does that indicate there, July 7, $1,283.16?

A. That's a charge against her account.

Q. What is? A. That $1,283.16.

Q. What for?

A. For the Dome City Bank—gives credit back to the bank for that amount.

Q. It don't mention the bank, does it?

A. No, sir, it doesn't, but by taking it through you can tell—as I have it anyway.

(Testimony of Jesse Noble.)

Q. Well, it don't say anything about any nugget there, does it?

A. No, I don't see anything about that.

Q. As a matter of fact, you don't know what that is for, except what is shown on the books?

A. It doesn't show what it is for at that particular place.

Q. You don't know anything about it personally? A. No, sir.

Q. Now, this account on page 150 of the same book—"loan Account," it says. A. Yes, sir.

Q. "July 7, J. L. Tobin $1,283.16"; now, what does that mean—that he paid that that day?

A. It means that was credited to him that day.

Q. It was credited to him?

A. Yes, sir, his indebtedness there at the bank.

Q. That doesn't indicate there what it is, does it?

A. Well, this is the loans, and he has a credit; that indicates he has a credit on his loan whatever he might owe; of course it doesn't write that out in full.

Q. That shows he has so much credit on what he owes the bank?

A. Yes, sir, on that date. Not what he owes the bank, but a portion of what he owes the bank I should say.

Q. It doesn't say what that's for either?

A. No, sir.

Q. There is no explanation attached to it whatsoever? A. No, sir.

Q. You don't know what it's for?

(Testimony of Jesse Noble.)

A. No, I couldn't swear positively.

(Noon recess.)

(2 P. M. 2-11-10.)

Mr. CLEGG.—Mr. Noble, this is Defendant's Exhibit "E" that you testified about this morning?

A. Yes, sir, I believe so.

Q. Do you recall now which page it was you testified about and exhibited to the jury?

A. Why, I believe I can. (Showing to counsel.)

Q. Is that where it says "July 11, nugget $1,283.16"? A. Yes, sir.

Q. Will you explain to the jury why he is credited with that amount on that date?

A. Well, this book is his private bank-book and it might be—without he put it in at that time, unless he put it in the first of the month—those are balanced as a rule the first of the month.

Q. Would the bank records show on what date he should be credited with that amount?

A. Yes, sir; it shows the exact date he was credited.

Q. Why doesn't it correspond with his pass-book?

A. Because the book is turned in and it is entered on this book.

Q. Did you ever deliver that book to Mr. Tobin yourself? A. No.

Q. How long have you had it in your possession?

A. All fall and winter, I believe.

Q. And how long before that?

A. Well, I couldn't say; this is the last time it

(Testimony of Jesse Noble.)

was balanced up.

Q. Can you state to the jury any time when, to your own knowledge, Tobin was in possession of this book?

A. That, I couldn't say—I presume he did.

Q. Still you say it is Tobin's pass-book?

A. Yes, sir.

Q. Do you know whether it is or not?

A. Well, by taking it back and figuring it up at the time, it is the one he claimed he left there.

Q. Who claimed?

A. The cashier of the Dome City Bank.

Q. And that's all you know about it?

A. Yes, sir.

Q. When did they make that statement to you?

A. That's the statement made at the time the question came up about this nugget and that's the first time I ever investigated it.

Q. The cashier picked the bank-book up and showed it to you?

A. No, I don't think so; I remember seeing it at the bank at the time it was discussed.

Q. Can you explain to the jury why this book doesn't correspond with the books of the bank and that that credit is given here on July 11th?

A. Well, that might be credited on the last of the month.

Q. Then, you can't explain why he is given credit for it on the 11th and not before that time?

A. He was given credit for it before on the books of the bank.

(Testimony of Jesse Noble.)

Q. Yes, but I mean on his bank-book?

A. That's because it wasn't balanced at that time.

Q. Does it show it was balanced on that date?

A. Yes, sir.

Q. So his pass-book was in the possession of the bank, and there was no credit entered on that date for $1,283.16?

A. This is the 11th—this gives the date of July 11th.

Q. Well, just answer the question, if you can?

A. Just state it again, please.

Q. I say his pass-book was in the possession of the bank all that time, and yet that credit was not given to him on the date of the transaction, or before July 11th?

A. That's because it wasn't balanced that day.

Q. Well, it was in the possession of the bank on the 7th. A. Yes, sir.

Q. There was no entry made in that book on that date of this sum of $1,283.16?

A. Well, you say in the possession of the bank—at the bank—I would verify that—of course, I wasn't there.

Q. Didn't you say you saw the bank book of Tobin at that time?

A. No, I saw it after the trouble came up,—after the nugget was turned over or turned in—

Q. Turned in where?

A. To the Dome City Bank.

Q. When was that?

A. That was on July 7, 1908.

(Testimony of Jesse Noble.)

Q. Was the book in the bank at that date?

A. Yes, sir.

Q. How did it come to be turned in again?

A. Well, that's the time he authorized them to do so according to their statement to M. C. Mulrooney and the bank give him credit on the indebtedness.

Q. Isn't it a fact, that Mr. Tobin never had that book in his possession at any time?

A. That, I wouldn't say positively.

Q. Isn't it a fact that he has been trying to get his bank book and get a statement from you for over a year? A. No, sir.

Q. How long has it been?

A. The first time he made any demand for a bank-book was a couple of months ago.

Q. Did the bank ever render Tobin a statement of his account that you know of in the last year?

A. Well, not outside of his pass-book.

Q. Hasn't he been demanding from you as an officer of the bank that you render him a statement and turn over his papers and pass-book and other memoranda that belonged to him?

A. No, sir; he hasn't with the exception of the one time I speak of he said he wanted his book, and I says for him to go and get it.

Q. You deny that what I state is true?

A. Yes, sir, I do.

Q. How long since that conversation occurred that you refer to now?

A. Well, it may be a month, I'm not sure; there was some matter came up that he wanted to in-

(Testimony of Jesse Noble.)

vestigate and I says go and get your book.

Q. That's about the time you started a suit against him?

A. No, sir, it was before; it was something about a credit he wanted to see from dust of the Nigger-head Group.

Q. Mr. Noble, you admit in your answer that the Dome City Bank is a corporation organized under the laws of the State of Washington?

A. Yes, sir.

Q. When did you last hold a meeting of the directors?

Objected to as incompetent, irrelevant and immaterial.

Mr. CLEGG.—I want to show that this is a dummy bank, that there is no substance to it and that there are no stockholders, no directors, and no meetings ever held and that it is a private concern of Miss Mulrooney and the Noble family.

Objected to as immaterial.

The COURT.—This is a suit in replevin, Mr. Clegg, and I think you may inquire who the officers were and who transacted all of the business and who had absolute control out there, but whether or not it is a dummy institution can't make any difference as far as the suit in replevin is concerned. I don't see how it could even show good faith on the part of the defendant; they may organize a bank and not comply with the laws at all; it is no evidence of dishonesty on the *part any* one individual composing it. I think the sole question here is to show who was

(Testimony of Jesse Noble.)

the owner of the nugget at the time the plaintiff bought it; if her grantor owned it at the time he gave her the bill of sale, it's her property; if the bank owned it, whether it is a dummy or not, her suit is defeated—that's all. *x x x* Plaintiff excepts.

Mr. CLEGG.—You didn't become manager of the bank until November 25th, 1907?

A. I think that's the correct date.

Q. So you have no knowledge personally of any transactions with depositors and the bank prior to that time? A. Why, the bank-books.

Q. Yes, the books. Now, you referred on direct examination to the cash account of the bank under date of July 7th, and to the account of Margaret C. Mulrooney of that date; I failed to notice that you pointed out any account of Tobin's with the bank, either on that date or any other time. Have you those books with you which show his account and the state of it?

A. Yes, sir, I think I have the books that will show his loans there.

Q. Can you refer to it handily?

A. Also his notes.

Q. Well, he had a current account with the bank, drawing checks all the time during 1907 and 1908?

A. Yes, sir.

Q. Have you that account there to show the amounts you paid out on his checks and any deposits he paid into the bank from June 7, 1907, up until July 7th, 1908? A. From July 7th, 1907?

Q. No, June 7th, 1907, from the time he deposited the nugget?

(Testimony of Jesse Noble.)

A. This book shows here, the pass-book.

Q. I have examined that, sir, and it has nothing of the kind in it. Have you the bank's books of account with Tobin showing all deposits by him and money paid out on his checks?

A. Yes, sir, I think so.

Q. Well, where is that shown?

A. I haven't it here.

Q. Why didn't you bring it here, sir?

A. Because I thought these would be sufficient.

Q. There must be a big business going on out there now?

A. No, sir, not a big business; but it is something you use daily.

Q. Yes—so you didn't bring the book that contained Tobin's account, did you?

A. No, I figured the notes would be sufficient.

Q. What note?

A. The note for his indebtedness there.

Q. Did you just bring one of them?

A. No, I have two.

Q. Did you bring them both down?

A. I think they are both here, one endorsed by another party and one his own note.

Q. You probably remember, Mr. Noble, of signing an answer in this case? A. Yes, sir.

Q. The original answer—that is your signature, isn't it? (Showing witness paper.)

A. Yes, sir.

Q. And you swore to that? A. Yes, sir.

Q. Did you read it before you signed it?

(Testimony of Jesse Noble.)

A. No, I didn't read it very carefully; I looked it over, I can't say I paid any particular attention to it, that is more than to glance over it—that's a matter I left to my attorney as long as he acted for me.

Q. How closely did you read it?

A. I glanced over it is about all.

Q. Just glanced over it this way? (Illustrating.)

A. No, I read part of it—I think practically all of it.

Q. Do you know whether you did or not?

A. Well, I think I did, practically.

Q. Well, this affidavit here that you signed, swears that you did read it?

A. Yes, I know it does.

Q. Do you know whether you read it or not?

A. Well, I'm inclined to think I did.

Q. The whole of it?

A. Yes, I'm inclined to think all of it.

Q. Now, it says in there, Mr. Noble, in this original answer you swore to which is marked Plaintiff's Exhibit No. 4 and sworn to on January 16th, 1909, in the last paragraph, "That thereafter and in the month of June, 1908, the said Tobin duly sold and assigned the said nugget to this defendant—" that's the Dome City Bank?

A. I didn't quite get that.

Q. "And that this defendant gave the said Tobin, in consideration thereof due credit on the debt he then owed to the defendant bank in the sum of the

(Testimony of Jesse Noble.)

full value of the said nugget, to wit, the sum of $1,383.00." Now, when this case was called—

A. Does it say no cents, or sixteen cents?

Q. No, it leaves out the sixteen cents. When this case was called for trial, you amended the answer to read that the said Tobin on the 7th day of July, 1908, sold and assigned the said nugget to Margaret Mulrooney? A. Yes, sir.

Q. Didn't you know anything about this nugget from Tobin when you signed that answer on January 12, 1909? A. Yes, sir, I did.

Q. And you stated that as a fact in that answer, did you?

A. Now, there is one amendment there, I practically left the answer to Mr. Heilig, my attorney, he made the amendments in that and he asked me about it and I said it was a mistake in the answer.

Q. Didn't you know when you signed that answer on January 12, 1909—that's over a year ago—who bought this nugget so far as the bank was concerned, from Tobin? A. Yes, sir.

Q. And did you state at that time who it was?

A. Yes, sir.

Q. And you stated at that time that it was the Dome City Bank that bought it?

A. No, I don't think I made a statement as far as who bought the nugget; I knew within a couple of days when it was sold but the answer I left to my attorney *which* did make a mistake in the answer.

Q. Your attorney made the mistake?

A. Yes, sir.

(Testimony of Jesse Noble.)

Q. So when you read it over and swore to it you didn't know that he had made a mistake?

A. No, I didn't at that time.

Q. And you didn't notice it for over a year, and until after this case was called for trial and ready to be tried yesterday?

A. I don't believe I would have noticed it then if it hadn't been for the attorney.

Q. And that's the explanation you make to this jury for changing the agreement on the part of the defendant that Tobin sold this nugget to the bank—or to Margaret Mulrooney instead of the Dome City Bank? A. Yes, sir.

Q. And for the same reason, probably, you changed the date when it was sold from June, 1908, and made it read some time in the month of July, 1908? A. No, sir, it was not.

Q. What was the reason for that?

A. I didn't make no changes there at all.

Q. Oh, yes; it is changed now so as to read July, 1908. Have you any accurate idea, Mr. Noble, when this nugget was transferred from Tobin to Margaret C. Mulrooney or the bank?

A. I have his statement for it.

Q. What date did he say it was?

A. Well, the date when he told me was in July; as to positive dates I won't swear to, but I *were* in town that time and that's the first I knew that Margaret *Mulrooney taken* the nugget.

Q. As a matter of fact, you weren't paying any attention to the bank's business either in June or

(Testimony of Jesse Noble.)

July, 1908, except to collect royalties?

A. Oh, yes, I did.

Q. You were out collecting royalties and the bank was being managed by Margaret Mulrooney?

A. As cashier; yes, sir.

Q. And she was transacting all the business, practically?

A. No, sir, I was purchasing dust and lots of things.

Q. And she was right there in the bank, in care of it and actually waiting on the customers?

A. Yes, sir.

Q. And attending to anybody who came there to do any business through the wicket?

A. Yes, sir, most of the time.

Q. You never pretended to do any of that character of work out there, did you?

A. No, sir, I did not.

Q. And that's the character of work she did all the time she was out there—cashier?

A. Yes, sir.

Q. And she kept the books too?

A. Yes, sir.

Q. And balanced the accounts when necessary?

A. Yes, sir.

Q. And wrote up all the bank-books for the depositors? A. Yes, sir.

Q. And cashed all the checks that were brought in there?

A. Yes, she cashed all that she wanted to honor, I presume.

(Testimony of Jesse Noble.)

Q. Did you ever weigh that nugget, Mr. Noble?

A. No, sir.

Q. You don't know what the value of it was?

A. Nothing only the statement of the different parties; I never weighed it myself.

Q. You don't know whether it was $1,283.16 or $1,583.16?

A. Well, no, not by seeing it weighed myself.

Q. Do you know how many ounces it contained?

A. Only what I gained through information from others and the books.

Q. Well what—the books of the bank you mean?

A. Well, the value of it that they state is the way I have to tell.

Q. What books of the bank show how many ounces it contained?

A. No, it doesn't show ounces, it shows the amount in dollars that was paid for it.

Q. Now, why did you change the value of this nugget in your answer as amended from the statement made in the original answer, wherein you state that the value is $1,383.00 and no more, to saying in the amended answer that it is of the value of $1,283.16?

A. Well, taking the figures, the weights and figuring the value of the dust, there must be some mistake in regards to the value; I figured it at $1,283.16 at $17.00 an ounce; if that's correct—I tried to figure it correct, would make it per ounce $17.42.

Q. Without knowing what the weight of the nugget was?

(Testimony of Jesse Noble.)

A. Well, taking the weight of the nugget as they have given it.

Q. Well, what weight would you consider as given under those calculations?

A. It would be 73.53 ounces, if I remember.

Q. You were present when the deposition of Margaret Mulrooney was taken November 14th, 1908?

A. Yes, sir.

Q. And your answer was filed subsequent to that on January 19th, 1909?

A. I don't know the date.

Q. It was sworn to on the 16th.

A. Some time after, I know.

Q. So you had all the knowledge concerning this matter that you were ever likely to get at the time when the original answer was filed?

A. No, I didn't have all the knowledge; there was some knowledge I gathered up since.

Q. You had all the bank-books in your possession? A. Yes, sir.

Q. All the records of the bank?

A. Yes, sir.

Q. And had opportunity to know everything connected with this transaction up to that time?

A. Yes, the opportunity of knowing from the books what they showed.

Q. Did you say you were present in the bank at the time Miller Thosetson was in the bank?

A. Was I present at the time?

Q. Yes, and heard this conversation?

A. No, sir.

(Testimony of Jesse Noble.)

Q. Did Mr. Thosteson ever offer you to pay Tobin $18.00 for that nugget per ounce? A. No, sir.

Q. You're sure about that?

A. He offered him $18.00 by taking the nugget out and not satisfying the account it was left there for.

Q. He offered Tobin?

A. I don't think he offered it; I think he said he would give Tobin $18.00 an ounce.

Q. When was that, do you remember?

A. I think he told me that a few days ago.

Q. Who, Thosteson did?

A. Probably a month or six weeks ago, I was speaking to him about it one day; I believe that's the only time he ever told me he would pay that price for it.

Q. Do you know whether Tobin ever received a dollar from Margaret Mulrooney or the Dome City Bank for this nugget? A. For this nugget?

Q. Yes, sir.

A. Why no, I don't think he received the cash for the nugget—that is, he was—he checked against it—he received the cash if he checked against the nugget according to what I learned from them.

Q. When did he check against it?

A. I think it was in September, 1907.

Q. Up to the full value of the nugget?

A. Yes, he had checked more than the value of the nugget in the month of September, 1907.

Q. Then, how does it come, Mr. Noble, that in July, 1908, that he should get additional credit for

(Testimony of Jesse Noble.)

the value of this nugget as shown by the books of the bank at $1,283.16?

A. Well, the nugget was left there with the explanation to me, with the understanding it secured the checks that should come in for his overdraft.

Q. I didn't quite catch that.

A. I say, the nugget was in the safe as that was explained to me, of course, I wasn't here at the time.

Q. I'm asking you now, sir, to testify of your own knowledge as an officer of the Dome City Bank—you were an officer in July the 7th, 1908?

A. Yes, sir.

Q. How, then, did the bank come to extend him credit for the value of this nugget as you say $1,283.16 at that time, when he had already been permitted by the bank to check against it to more than its value?

Objected to as assuming something not shown by the testimony.

The COURT.—This is proper cross-examination. The witness can answer if counsel's assumption is not correct. Objection overruled. Exception by defendant.

A. He wasn't credited with the nugget in 1907. He wished to take it—he wished to leave it there as security and he wished to keep it so he could redeem it, being a large nugget; he explained that to me once—outside of that he wanted us to keep the nugget and give him a chance to redeem it. So in July, 1908, is the time he was given credit for the nugget by Miss Mulrooney.

(Testimony of Jesse Noble.)

Q. And he had been advanced all the money prior to that time, had he?

A. Yes, sir, prior to that time.

Q. Well, how long prior to that time?

A. I think he was advanced all the money in September, 1907, or before the middle of September, if I remember right.

Q. Then, why would there be any occasion for Margaret C. Mulrooney to show in her account with the bank that she had paid to the bank $1,283.16 on the 7th of July, 1908?

A. That is the time that Mr. Tobin asked for the nugget to be credited on his account, I believe, or to the bank, the value of it.

Q. Did you ever hear anything about this transaction concerning the nugget prior to July 22d, 1908?

A. Yes, I had known it was there in the bank.

Q. That's all you knew about it?

A. Yes; at least the way they explained it to me.

Q. Well, you saw it there?

A. Yes, I saw it there.

Q. That same month?

A. Well, I won't be certain about the month, but I'm inclined to think I did see it in July there.

Q. And the books that you have shown here are the only books of the bank which show anything in connection with this transaction?

A. No, I think the other books will show; no, I guess those books here will show practically everything in connection with it.

Q. Well, I guess that's all.

(Testimony of Jesse Noble.)

Redirect Examination.

(By Mr. HEILIG.)

This other book that you speak of that you say contains the individual account of J. L. Tobin showing deposits by him and sums credited to him and checks drawn against his account?

A. Yes, sir.

Q. And you say that contains the accounts of a large number of other depositors?

A. Yes, sir.

Q. And it is important to keep that at the bank?

A. Yes, sir.

Q. Now, state whether it is a fact that that pass-book is a copy or transcript of that individual account of Tobin?

A. Yes, sir; I believe it is.

Objected to as incompetent and immaterial, and move that the answer be stricken.

The COURT.—Unless the witness knows it or has compared them—have you compared the two accounts?

A. No, I haven't myself; the cashier has.

The COURT.—I don't think it is competent, Mr. Heilig, until he has made a comparison. Motion sustained. Exception.

Mr. HEILIG.—Do you know who prepared that pass-book?

A. Margaret Mulrooney.

Q. And that it was balanced up on the day that is shown in the pass-book? A. Yes, sir.

Q. I'll ask you whether it is the method of busi-

(Testimony of Jesse Noble.)

ness of the bank to show in the cash-book a transcript or copy of the individual account kept in that book that you speak of? A. Yes.

Q. Now, you were asked in regard to a mortgage given to you back in October, 1906, for $4,480.00 —do you know what became of that?

A. That mortgage is cancelled, I believe.

Q. You were asked in regard to a mortgage given on June 3, 1907, for $3,180.00 by Lindsay, Niemitz & Tobin, I believe, to the Dome City Bank?

Objected to as not redirect examination. Objection overruled. Exception.

Q. What became of that mortgage?

A. I think Mr. Tobin has an assignment; I think it was satisfied; I don't think it was cancelled on the records, but I think he has documents showing it is satisfied.

Q. You were asked about a mortgage made September 13, 1907, for $3,710.00 by Mr. Tobin; is that the note you testified to yesterday?

A. Yes, sir.

Q. Have you prepared a statement of the account with Mr. Tobin showing interest, charges, and credits upon that note and mortgage?

A. Yes, sir, what should be applied on it.

Q. I will show you a statement and ask you whether that is the statement you refer to?

Objected to as immaterial, incompetent, and not proper redirect examination.

The COURT.—What is the purpose, Mr. Heilig?

Mr. HEILIG.—That matter was brought out on cross-examination.

(Testimony of Jesse Noble.)

The COURT.—What difference does it make about that account?

Mr. HEILIG.—We want to show that Tobin is still indebted to the bank and that he is credited with this identical sum of $1,283.16, to be followed up by showing that the note and mortgage were given to secure the overdraft he owed to the bank at the time, and that he was credited with the value of that nugget.

The COURT.—I think that is not competent. This is an action in replevin for the recovery of a certain gold nugget or the value thereof. The plaintiff claims that she was the owner of the property, and has been ever since a certain date when it was conveyed to her by Tobin. The defendant claims that one Miss Mulrooney was the owner of the nugget on that date and has been ever since. The (defendant) plaintiff pleads that the nugget was deposited in the bank to secure a certain overdraft of Tobin—that it was there for that purpose and not for safekeeping as the plaintiff claims. Now, if it was there for the purpose of that security, any other indebtedness that Tobin may have owed the bank is absolutely immaterial in the determination of ownership or the right of possession to the nugget, because you don't plead that the nugget was held for such other debts. * * * This sort of evidence merely tends to confuse the jury and bring in things not germane or pertinent to the case. Objection sustained. Defendant excepts.

Mr. HEILIG.—Now, in regard to that nugget,

(Testimony of Jesse Noble.)

you have there this pass-book, exhibit "E," it appears that that account was commenced on April 28th, 1907, the first item credited to Mr. Tobin is 398.22 ounces of dust, I believe; it also appears that this book was balanced the first time in August, 1907. I wish you would state to the jury whether that book was then delivered to Mr. Tobin?

A. That was August, 1907?

Q. The first balancing of that book—the first time the balance was struck?

A. I understand. That, I couldn't state positively myself—it was his book, of course.

Q. There is a memorandum here at the time of balancing that, it says that "140 cancelled checks herewith, M. C. M."; whose initials are those?

A. Margaret C. Mulrooney's.

Q. And do you know what that statement means, "140 cancelled checks herewith"?

A. Well, that's when it was balanced.

Q. What was done with the checks?

A. Given to Mr. Tobin, I guess.

Q. Can you tell whether the book was given to him at the time the checks were delivered?

A. I couldn't say myself, of course, I wasn't there at the time.

Object to the answer, and move that it be stricken as hearsay.

Motion sustained. Exception.

Q. I'll ask you what was the business method of the bank in regard to returning those pass-books to the depositors?

(Testimony of Jesse Noble.)

Objected to as not redirect examination, incompetent, irrelevant and immaterial.

Objection overruled. Plff. excepts.

A. Why, they are balanced when they are returned. It is rulable to balance them but once a month; if a man is checking and drawing his money he leaves them the first of the month to be balanced.

Q. And what is the custom of the bank in regard to what they do with the pass-book and checks after it is balanced?

A. Return them to the depositors.

Q. And when he the next time makes a deposit, what is done?

A. It is entered in the book.

Q. He brings the book along?

A. Yes, sir.

Q. As far as you know that was done with that book? A. Yes, sir.

Q. You don't mean to say that that book was from the very first day remaining there in the actual possession of the bank without ever going out of its possession?

A. No, I don't mean to say that it was.

Q. But you meant to tell the jury on your examination in chief that the last time it was balanced he didn't call for it—is that it?

Objected to as leading.

Objection sustained.

Q. You did testify you told him he could get it any time? A. I did.

Q. After Margaret Mulrooney bought this nug-

(Testimony of Jesse Noble.)

get from Tobin was there any reason why the bank should keep any record as to where the nugget went to? A. Not to my knowledge.

Q. Was it the custom or business method of the bank to keep a record of where nuggets went to?

Objected to as immaterial and not redirect examination.

Objection sustained. Exception.

Q. At the time these depositions were taken of Mrs. Carbonneau and Miss Mulrooney did they have before them the books of the bank?

A. No, sir, they did not.

Q. Where were they going to at that time?

Objected to as immaterial and not redirect examination.

Objection overruled.

A. They were on their way outside.

Mr. HEILIG.—That's all.

Recross-examination.

(By Mr. CLEGG.)

You don't know of a single occasion of your own knowledge when that bank-book was in the possession of Tobin?

A. No, I couldn't state that.

Mr. CLEGG.—That's all.

[Testimony of Miller Thosteson, for Defendant.]

MILLER THOSTESON, witness called on behalf of defendant, being first duly sworn testified on

Direct Examination.

(By Mr. HEILIG.)

What is your full, name, Mr. Thosteson?

A. M. B. Thosteson.

Q. You spell it T-h-o-s-t-e-s-e-n?

A. No; o-n.

Q. Are you acquainted with J. L. Tobin?

A. I am.

Q. How long have you know him?

A. I met him in 1905.

Q. Have you had any business relations with him since that time Mr. Thosteson?

A. Yes, he had a lease on my ground.

Q. On what ground?

A. No. 1 Above—

Objected to as immaterial.

Objection overruled. Plaintiff excepts.

Q. Do you know the occasion of his finding a large nugget on that tract of ground?

Same objection and ruling.

The COURT.—I take it it is preliminary.

Q. What became of that nugget or what was done with it immediately after it was found?

A. Why, Mr. Tobin got possession of it.

Q. How?

A. Mr. Tobin he bought my interest in it.

Q. What?

A. He bought my interest in it.

(Testimony of Miller Thosteson.)

Q. Do you know where he put it?

A. Why, he put it in the Dome City Bank to the best of my knowledge.

Q. Did you ever see it there?

A. Yes, sir.

Q. Do you know that he took it out of the Dome City Bank after he put it there?

A. I believe he did—I'm not sure.

Q. Do you know where he put it after he took it out of the Dome City Bank? A. No.

Q. Do you recollect ever seeing it in Judge Thomas' place of business?

A. I might have seen it there; I'm not sure; I saw it different places where he was showing it.

Q. Different places?

A. He used to carry it around some and show it to his friends.

Q. Where, in Dome City? A. Yes.

Q. Have you seen him carry it around in Fairbanks too?

A. I never saw it in Fairbanks.

Q. Did you on or about September, 1907, go with him into the Dome City Bank with reference to this nugget? A. No, sir.

Q. What? A. No, sir.

Q. Were you there about that time when he was there?

A. I saw it in the Dome City Bank in 1907 and that's the last I have seen it.

Q. Were you there at or about that time and had a conversation with Margaret Mulrooney in the pres-

(Testimony of Miller Thosteson.)

ence of Mr. Tobin?

A. Yes, in 1908—this occurred in 1908.

Q. O—then you were there. Well, were you present on or about July 7th, 1908, in the Dome City Bank when Mr. Tobin was present and Margaret Mulrooney?

A. I don't think that was the date; I believe it was the 20th of June I was there.

Q. You think it was June 20, 1908?

A. Yes, sir.

Q. Did you hear any conversation between J. L. Tobin and Margaret Mulrooney concerning that nugget?

Objected to as immaterial, no foundation having been laid.

The COURT.—Was that in the presence of Mr. Tobin? A. Yes, sir.

The COURT.—There might be a mistake in the dates, but the circumstances are sufficiently well described to call it to the attention of the witness Tobin.

Plaintiff excepts.

A. Why, I wanted to get the nugget myself and Miss Mulrooney said they couldn't let it go because they were holding it for debts that Tobin owed them.

Mr. CLEGG.—Was Tobin there?

A. Yes, sir.

Mr. HEILIG.—Now, at that time did Mr. Tobin say to you in substance that he would like to turn over the nugget to you because it would stop interest?

(Testimony of Miller Thosteson.)

A. Why, no, I don't think he made that statement.

Q. Something to that effect?

A. It wouldn't stop interest; it was to be applied on a note that he owed me.

Q. That's what he said? A. Yes, sir.

Q. He didn't suggest him getting the nugget at that time? A. No.

Q. Can you give the reason that was given, in his presence, why he couldn't get that nugget?

A. He owed the bank and they were holding it to secure them.

Mr. CLEGG.—Is that what he said?

A. That's what Miss Mulrooney told me.

Q. You were asked what Tobin told you?

A. I don't remember of him making any statement whatever.

Mr. HEILIG.—That statement was made by Margaret Mulrooney? A. Yes, sir, to me.

Q. In his hearing? A. Yes, sir.

Q. Do you recollect that about that time Margaret Mulrooney said to Tobin, in the presence of Mr. Tobin and yourself, that "if you are in a hard place I will take the nugget and charge it to my account, it will stop interest to the Dome City Bank, and I won't charge you any interest"?

A. I did not hear that statement.

Q. Did you hear any statement wherein Margaret Mulrooney said she would buy the nugget from Mr. Tobin? A. No, sir.

Q. Did Mr. Tobin at any time tell you that Mar-

(Testimony of Miller Thosteson.)

garet Mulrooney had bought it from him?

A. No, sir.

Q. Did he tell you that at any time?

The COURT.—That is not competent, Mr. Heilig—at any time; anything he would say after he claimed to have sold it to the plaintiff would not be competent. Defendant excepts.

Mr. HEILIG.—How often were you present in the bank at the time Mr. Tobin was there that you heard any conversation between him and Margaret Mulrooney on relation to this nugget?

A. Just the one time.

Q. Will you state what was said by Mr. Tobin on that occasion?

A. I don't remember him saying anything—he is a very quiet man. As soon as I found out I couldn't get the nugget I left.

Q. Will you state what was said to him by Margaret Mulrooney in regard to the nugget at the time?

Objected to as repetition and not redirect examination.

Mr. HEILIG.—This is prior to the 7th of July, 1908.

Mr. CLEGG.—This is supposed to be June 20th, 1908.

The COURT.—If there is any question about it he may answer.

A. What was the question?

Mr. HEILIG.—I asked you at the time you were there what did Margaret Mulrooney state to Tobin about the nugget?

(Testimony of Miller Thosteson.)

A. There was no conversation between Tobin and Miss Mulrooney regarding the nugget. Her conversation was with me as to why I couldn't get the nugget.

Q. In his presence? A. Yes, sir.

Q. He heard what was said?

A. I don't know.

Q. And what did she say to him regarding the nugget?

Objected to as incompetent, irrelevant and immaterial, and a self-serving declaration.

The COURT.—I know, but this particular matter was inquired into, and it is competent for this witness to state what he knows about it. Plaintiff excepts.

Mr. HEILIG.—Well, what did she say to you in his presence?

A. She told me they couldn't let it go because Tobin owed them money and they held the nugget to secure them—that was the substance of it, I don't know as it is the exact words.

Cross-examination.

(By Mr. CLEGG.)

You didn't hear Tobin say a word?

A. No, not that I remember of.

Q. You wanted to purchase the nugget at that time?

A. No, I wanted to apply it on this note and give him full credit for the full value of it and he had the option of redeeming it within two years.

Q. Miss Mulrooney knew that you held a mort-

(Testimony of Miller Thosteson.)

gage of Tobin—that Tobin had given a mortgage to you? A. Yes, sir.

Q. And that you were a creditor of Tobin's at the time? A. I think so, yes, sir.

Q. And you asked her concerning this nugget if she would turn it over to Tobin for your benefit to apply on the mortgage?

A. No, I didn't consult her about it at all.

Q. How did the conversation come up?

A. Mr. Tobin went to get the nugget, and as he didn't come back with it I went to see why it took him so long, and when I asked about it—

Q. And that's what she said—Tobin owed them money and they were holding the nugget until it was paid? A. Yes, sir.

Q. Now, Mr. Thosteson, have you any way of fixing the exact date of that conversation as the 20th day of June, 1908?

A. Yes, sir, he gave me an assignment that same day of a portion of his clean-up on the Nigger-head Association.

Q. And that's how you remember the date?

A. Yes, sir.

Q. You sold your interest in this nugget to Tobin originally? A. Yes, sir.

Q. How much value did he give you for it?

A. Eighteen dollars an ounce is what he paid.

Q. How many ounces was it, do you remember?

A. I'm not sure about the exact weight, about 73-1/2 ounces.

Q. Very little quartz in it?

(Testimony of Miller Thosteson.)

A. It was a solid nugget.

Q. It was easily worth eighteen dollars an ounce?

A. Yes, sir, I was willing to give that much for it.

Q. That's all—just a minute! Did you have a conversation with Tobin after you left the bank that day? A. I don't remember whether I did.

Q. In which he explained his situation to you, and stated that the bank had no mortgage or claim on that nugget?

A. I don't remember just what he said; of course we was talking about the nugget later.

Q. Did you understand him at any time on that date that the bank had a mortgage on that nugget?

A. He didn't say they had a mortgage on it, or any claim that I remember of.

Q. Well, he didn't say they had any claim on it?

A. Well, I don't remember whether he did or not.

Q. When he left you and went to the bank he went for the purpose of getting the nugget?

A. Yes, sir.

Q. And you had no doubt when he would bring it back? A. No, sir.

Redirect Examination.

(By Mr. HEILIG.)

You got a large amount of gold from No. 1 Above where this nugget came from? A. Yes, sir.

Q. What did you get for your dust?

A. We sold it for seventeen an ounce.

Q. Was that nugget worth more than seventeen an ounce market value?

A. Well, I was willing to give eighteen, and I

(Testimony of Miller Thosteson.)

think anybody would.

Q. Well, that's because it was such a large nugget—you have no idea that it would assay higher than fine dust?

A. I believe it would net eighteen dollars an ounce.

Q. That was never assayed to your knowledge?

A. Not that one; I took other nuggets from that claim outside.

Q. You are basing your idea of its value on what you got outside and not what you get here?

A. Yes, sir.

Q. Would you say that that nugget in Dome City at that time was worth $18.00 an ounce?

A. That wasn't the commercial value, they were paying $17.00 on those claims.

Q. And in July, 1908, that's all it was worth out on Dome? A. Yes.

Recross-examination.

(By Mr. CLEGG.)

There's some difference between the prices paid out on the creeks for dust and what they pay in town here for instance? A. Well, we got the same.

Q. You were willing on the 20th day of June, 1908, to give $18.00 an ounce to Tobin for that gold?

A. Yes, sir, and anxious.

Q. And to allow him that much credit at that rate for any indebtedness that he owed you?

A. Yes, sir.

Mr. CLEGG.—That's all.

Mr. HEILIG.—That's all.

Mr. HEILIG.—The defendant now offers in evidence the deposition of Belinda A. Carbonneau dated November 14th, 1908, taken at Fairbanks before E. T. Wolcott, notary public, between the hours of 8 and 9 o'clock of that date, in the presence of Cecil H. Clegg, attorney for the plaintiff, and James Wickersham, attorney for the defendant, in pursuance of stipulation between the parties.

The COURT.—If there is no objection, the deposition may be received and read in evidence.

Mr. HEILIG.—(Reading deposition to jury.)

[Defendant's Exhibit "F".]

[Deposition of Belinda A. Carbonneau, for Defendant.]

"BELINDA A. CARBONNEAU, after being duly sworn, testified as follows, to wit:

Direct Examination.

(By Mr. WICKERSHAM.)

Q. You may state your name?

A. Belinda A. Carbonneau.

Q. You are going outside now to the States?

A. Yes, I am going out to the States.

Q. You will not be back here until next spring?

A. About the 1st of April.

Q. In June, 1907, did you have any relations with the Dome City Bank?

A. Yes, sir. I was manager of the Dome City Bank at that time.

Q. Did you know a Mr. Tobin at that time?

A. Yes, sir.

Q. What is his full name? A. J. L. Tobin.

(Deposition of Belinda A. Carbonneau.)

Q. State if you had any business dealings with him at that time in relation to a nugget.

A. Yes, sir. In June he brought a nugget to the bank and left it for safekeeping.

Q. Did you give him a receipt for it?

A. Yes, sir.

Q. How long did the nugget remain there?

A. It remained there on or about a month.

Q. Then what became of it?

A. He took it out with the intention of taking it to town to show it to his friends.

Q. What was said between you and him at the time he took the nugget away from the bank?

A. He just said at that time that he was going to take it away to show to his friends, and later he advised me that he had left it with Judge Thomas in his safe.

Q. Did he deliver up the receipt at the time he took the nugget away?

A. No. He was asked for it, but he said he didn't have it with him, but as soon as he could find it he would give it to me.

Q. Who is Mr. Tobin?

A. He was a miner down on a group on Dome called the Shakespeare.

Q. Why didn't you insist upon the return of the receipt before you gave him the nugget?

A. He had been doing business with us from the time we started on Dome, and he had done a great deal of business with us, and he was always a man of his word. We didn't feel that we would have to

(Deposition of Belinda A. Carbonneau.)

force him to bring his receipt when he said he didn't have it with him and couldn't locate it.

Q. What did he say about it's locations at that time?

A. He looked in his vest pocket and couldn't find it, and he said: 'I can't just find it, but as soon as I find it I will give it to you.'

Q. So you gave him the nugget?

A. Yes, sir.

Q. When?

A. He brought it back to the bank some time afterwards, I don't know just exactly when.

Q. About how long afterward.

A. I would say about probably a month.

Q. After he took it away?

A. Yes. And he left it in the safe deposit box for a time in our bank.

Q. Did he redeposit it? A. Yes, later.

Q. When he brought it back he redeposited it?

Mr. CLEGG.—We object to that as leading and suggestive.

Mr. HEILIG.—Do you insist on these objections, Mr. Clegg?

Mr. CLEGG.—No, sir.

The COURT.—Very well, the record may show that they are waived.

Mr. HEILIG.—(Reading.)

Mr. WICKERSHAM.—Yes. Q. State the fact, then, as to what was done.

A. He placed it in a safe deposit box that he rented at our place, and he redeposited it later when

(Deposition of Belinda A. Carbonneau.)

his account was running low, and he said to me: 'Mrs. Carbonneau, you will consider that I may check against that nugget, but I would like to redeem it of course.' I said: 'All right, Mr. Tobin. Margaret will understand that your account will run as far as the nugget's value.'

Q. What was done about it after that? Go ahead and state the facts.

A. After that it was nearly a year, this June—

Q. You mean June, 1908?

A. Yes. A year from that he found himself in difficulties down on his group there, and Miller Thosteson was going to foreclose on him, and he asked me one day that if he could raise $1500 if I would return the nugget to him, and I said, yes, I would willingly. He said Thosteson was stuck on the nugget, and he said: 'If I could give him that nugget to add to his security, he wouldn't foreclose on me, and I could go on and work this season, and I could get enough dust out to clear everything.' I said: 'All right if you can give me $1500 I will surely give you the nugget.' He came back in a day or two and said: 'I can't make the raise.' Miller Thosteson came in with him, and Miller said: 'How about that nugget? Are you going to give it to me?' He said: 'Mrs. Carbonneau has got it for security and I can't give it. I can't make it go.'

Q. Was that said in Miller Thosteson's presence?

A. Yes. In Miller Thosteson's presence. And he said: 'I can't pay interest any longer, so you will apply that nugget, Margaret, on my account.'

(Deposition of Belinda A. Carbonneau.)

Q. When he said 'Margaret,' to whom did he address himself? A. To the cashier?

Q. To your sister?

A. Yes, my sister Margaret.

Q. Was she present at the time?

A. She was present at the time. We were standing close to the door; Thosteson had his back to the window, and Margaret was behind the counter, the desk.

Q. What was done in relation to the nugget at that time?

A. The nugget—the value of it, was applied to his account at $17.00 an ounce. I told him before that that I didn't think the bank would pay $17 an ounce for it; that is, if it was assayed it wouldn't amount to $17 an ounce, I thought, on account of the quartz that was in it, but to save the bank from making a loss we would try to sell it for that as an exhibit.

Q. When was it applied as a payment to his account? A. About in June.

Q. Do the bank-books show that?

A. The bank-books and his bank-book show the credit the very day he urged us to give him credit for it.

Q. Was it credited on his bank-book?

A. On his bank-book, yes, and on the books of the bank.

Q. Do you know the value of the nugget at that time?

A. I don't know exactly. I know that $17 an

(Deposition of Belinda A. Carbonneau.)

ounce was paid for it, and I didn't consider that the value of the nugget would amount to that much.

Q. You don't know exactly the amount of the credit?

A. No. But Margaret will know, for she made the entry.

Q. You think that was about June?

A. Yes, about June.

Q. The bank-books will show the exact date?

A. Yes, the books of the bank, the Ledger and Cash-book will show the exact date.

Q. Has he ever turned that receipt back to you?

A. No. He has not.

Q. What did he say about it at any other time?

A. He didn't say anything about the receipt. We never discussed it again.

Q. He had the nugget?

A. He had the nugget. And after the nugget was returned to us we didn't bother much about the receipt. After he ordered us to apply it, we didn't need the receipt.

Mr. WICKERSHAM.—That is all.

Cross-examination. (By Mr. Clegg.)

Mr. CLEGG.—(Motion to strike testimony waived.)

Mr. WICKERSHAM.—I will ask some further questions.

Direct Examination Resumed.

(By Mr. WICKERSHAM.)

Q. Did Tobin ever deposit more than one nugget with the bank?

(Deposition of Belinda A. Carbonneau.)

A. Only this one nugget to my knowledge.

Q. And all of your conversation with him had reference to this particular nugget?

A. To this particular nugget.

Q. Do you know about the amount of its value?

A. It was about twelve hundred, I believe.

Q. About $1,200.00?

A. About twelve hundred, I believe. I am not sure.

Q. About $1,200? A. Yes, about $1,200.

Q. Do you know anything about the suit that Mrs. Barnett has brought to recover this nugget?

A. I heard of it, yes.

Q. Do you know whether or not this is the same nugget that she brought suit to recover?

A. This is the same nugget.

Mr. WICKERSHAM.—That is all.

Cross-examination.

(By Mr. CLEGG.)

Q. You say the value of the nugget concerning which you testified is about $1,200?

A. On or about.

Q. It might be less than that?

A. If it was assayed. We valued it as $17 an ounce. It being the largest nugget in the country, I know that this is the nugget.

Q. Do you remember whether it was over 40 ounces?

A. Yes, I believe it was seventy something.

Q. You say that the first time Tobin had any dealings with you with reference to this nugget, that

(Deposition of Belinda A. Carbonneau.)

he left this nugget for safekeeping? A. Yes.

Q. Did you give him a receipt at that time?

A. Yes.

Q. It remained there about a month?

A. Yes, sir.

Q. That would be about July, 1907?

A. About. I may be mistaken about dates, but about that time.

Q. What did he do after that?

A. He took the nugget away from there. He said he wanted to show it to his friends in town.

Q. How long did he keep it?

A. A couple of months, I believe.

Q. He didn't give up the receipt at the time you delivered to him the nugget?

A. No. He didn't have it with him. He said he was coming to town, and he asked me if he could take it away as he wanted to take it to town to show to his friends.

Q. You granted his request? A. Yes, sir.

Q. Without demanding the return of the receipt?

A. We told him we wanted the receipt. He looked in his vest pocket and said he didn't have it with him.

Q. You were conducting a bank at that time?

A. Yes. I was at Dome.

Q. You considered that as the proper way to conduct the banking business, to give a valuable nugget to a depositor without demanding any receipt of him?

A. In that particular case. We had done a great

(Deposition of Belinda A. Carbonneau.)

deal of business with Mr. Tobin, thousands of dollars worth, and we found him honest in every other respect.

Q. How long did he keep the nugget after that?

A. He took it into town, and I don't know exactly how long he kept it. But when he brought it back, he left it with Judge Thomas in his safe.

Q. At the time you delivered this nugget to him he said to you, as you testified, that he couldn't find the receipt?

A. Yes. He looked in his vest pocket, and said: 'I have not got it with me, but as soon as I find it I will give it to you.'

Q. About a month later he returned it to the bank?

A. He brought it in and put it in a safe deposit box in our place.

Q. Did he have a key of the box?

A. Yes. He had the key to the safe deposit box there.

Q. You didn't give him a receipt at that time?

A. No.

Q. Do you ordinarily give a receipt for anything deposited in a safe deposit box?

A. No. We gave a receipt for the payment for the box.

Q. About what time after that did he deposit that nugget with you as an account?

A. He took it out of the box one day and he said: 'I wish to check against this.'

Q. Do you remember when that was?

(Deposition of Belinda A. Carbonneau.)

A. I don't know just exactly. It would be probably a month or two. I don't remember.

Q. The same year anyway?

A. The same year, yes, during the summer, maybe in the fall perhaps, about in September, I think. His account was running low and he said: 'I may want to check, Mrs. Carbonneau, and I want an understanding whether I can check against this nugget or not.'

Q. As I recollect, you testified on direct examination that this occurred in June, 1908?

A. When he brought the nugget, yes. In 1907 it was when he brought the nugget and deposited it.

Q. In June, 1908, I understood you to testify, he brought this nugget to you for the third time, and asked to have it deposited to his account?

A. No. I think you misunderstand me. He brought it in during the fall of 1907, and this year in June he said that he wanted that nugget applied to his account to prevent the interest.

Q. How much did he owe you at the time he made that statement?

A. Between three and four thousand dollars.

Q. Did you have any other security from him at that time?

A. We had some security, some wood as security.

Q. Anything else?

A. No, that was all. No, we had some horses.

Q. Anything else?

A. That is all I think of, horses and wood.

Q. Did you have a mortgage for them?

(Deposition of Belinda A. Carbonneau.)

A. We had a mortgage for the horses and wood.

Q. Have you the mortgage with you?

A. No. I have not. It is of record.

Q. Did the mortgage include the nugget?

A. No. It didn't mention that.

Q. He asked you at that time, you say, if you would redeliver this nugget to him if he could raise $1,500?

A. Yes. He asked me around June, if he could raise $1,500 if I would give him the nugget, and I told him I would.

Q. Had the bank advanced any more money to him other than the amount he was indebted to them at that time?

A. The security of the bank was much reduced by him using the wood, and he didn't have sufficient security to cover the amount the bank had advanced him.

Q. Did he at that time owe the bank any more money than they had security for?

A. Yes, sir.

Q. How much?

A. We owed the bank between three and four thousand dollars, and our security was very much reduced. The security originally was about three thousand dollars, I think, the wood and horses were valued at three thousand dollars, but during the summer and from the time he gave that mortgage he began to use this wood, and that security was being very much reduced.

(Deposition of Belinda A. Carbonneau.)

Q. How did he come to do business with you in June, 1908?

A. In June, 1908, he was taking his gold-dust from the 'Nigger-head' there.

Q. Were you holding any official position in the bank at that time?

A. No. But I did all the business with him from the beginning.

Q. Were you representing the bank in June, 1908?

A. No. I was not. I just happened to be there.

Q. Who did you represent in your negotiations with Mr. Tobin at that time?

A. I was arranging actually for the bank, or to help him, between Jesse and himself, to straighten his affairs out.

Q. Do you know of your own knowledge that he authorized you or any other officer of the bank to deposit this nugget to his credit?

A. Yes. I do.

Q. And to be applied on his account?

A. Yes, I do.

Q. You state that that occurred in June, 1908.

A. About June, 1908.

Q. Did you have anything to do with the bank at that time? A. No. I was not bookkeeper.

Q. Do you know whether or not there is any entry that shows on the books of the bank, of that transaction?

A. Yes. I saw the entry, and saw him book when it was entered.

(Deposition of Belinda A. Carbonneau.)

Q. You arranged this proposition entirely with Mr. Tobin, did you?

A. No. Not exactly. I was talking with Mr. Tobin outside of the counter, and we were speaking —Margaret, myself and Tobin were talking together about it. He said that it would not be any use for him, that he couldn't make good. He said: 'I can't make good, and I may as well have the interest reduced, cut off.' That was his words.

Q. Do you know where the nugget is at the present time?

A. The nugget is in Seattle at the present time.

Q. How did it come to be there?

A. It was sent out for the purpose of an exhibit.

Q. When?

A. Last summer after it was purchased.

Q. A Writ of Replevin was served upon you in this case? A. Yes, sir.

Q. By Mr. Frank C. Wiseman, Deputy Marshal?

A. Yes.

Q. Did you at that time, in answer to the Writ of Replevin, state to him that you didn't know where the nugget was?

A. No. I told him I wouldn't say where the nugget was.

Q. That was your statement? A. Yes.

Q. Why wouldn't you tell him at that time that the nugget was in Seattle?

A. I didn't think it was advisable until I discussed it with our attorney. I told him it was not in the building.

Mr. CLEGG.—That is all.

(Deposition of Belinda A. Carbonneau.)

Redirect Examination.

(By Mr. WICKERSHAM.)

Q. After the value of this nugget was credited to Tobin's account, was there any balance due the bank? A. Yes, sir.

Q. How much?

A. I don't know exactly, but Tobin still owed the bank quite a little money.

Mr. WICKERSHAM.—That is all.

Mr. CLEGG.—Nothing further."

Mr. HEILIG.—Then follows the notary's certificate. We would like to have this marked an exhibit.

Marked by the Clerk: No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Defendant's Exhibit "F." Filed in open court Feb. 11, 1910. Dist. Court Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

Defendant rests.

Rebuttal.

[Testimony of J. L. Tobin, for Plaintiff (in Rebuttal).]

J. L. TOBIN, being called by plff. on rebuttal, testified as follows on

Direct Examination.

(By Mr. CLEGG.)

You testified yesterday in this case?

A. Yes, sir.

Q. I'll ask you if at any time in the month of June, 1908, you ever had a conversation with the

(Testimony of J. L. Tobin.)

witness Jesse Noble who testified this morning, in front of the Washington-Alaska Bank in the town of Fairbanks, with reference to this nugget?

A. I don't ever remember of such a conversation whatever.

Q. Did you have a conversation with him in that place about that time in which you stated to him that Margaret Mulrooney had taken the nugget and given him credit at the bank for the price of it?

A. No, sir; that was never mentioned.

Q. Or in which you further stated to him that you had settled the claim of the bank against you and wanted to draw some more money from the bank?

Objected to on the ground that such is not the statement of the witness Noble, who said that he "had reduced his claim."

Q. Did you ever say to Noble that you had reduced your claim at the bank and wanted some more money?

A. No, sir, I never mentioned such a thing—not a word said.

Q. Anything like that? A. No, sir.

Q. Did you ever have any conversation with him on the subject at all? A. No, sir.

Q. Did you make an application to him for a further loan in the month of July, 1908?

A. No, sir, I never did.

Q. I wish you would detail to the jury, Mr. Tobin, about this visit you made to the bank after the interview with Mr. Thosteson.

(Testimony of J. L. Tobin.)

A. Well, I don't just remember—

Q. What was said if anything by Margaret Mulrooney—did she make any statement to you then?

A. Why, there was something said, yes.

Q. Did you at that time state to her in the presence of Thosteson, that "you couldn't make a go of it? A. No, sir.

Q. And that "you would have to let the nugget go"? A. No, sir.

Q. Did you ever have—let me see that deposition: Did you ever have any such conversation as Mrs. Carbonneau testifies here, in the presence of Miss Mulrooney? A. No, I never did.

Q. In which you authorized her to take charge of that nugget on behalf of the bank?

A. No, sir.

Q. And to reduce your account to the extent of the value of the nugget?

A. There was never a word mentioned about entering that nugget on the account.

Q. Did you ever ask her if you could raise $1,500 to give to her if she would return the nugget?

A. No, sir.

Q. Did you ever authorize her or any other officer of the Dome City Bank to deposit this nugget to your credit? A. No, sir.

Q. Or to apply it on your account?

A. No, sir.

Q. Did you ever have a conversation with her at any time when you took this nugget back to the bank after having had it out, in which you told her

(Testimony of J. L. Tobin.)

or anybody else representing the bank that you couldn't find the receipt, that you thought you had it in your vest pocket but couldn't find it?

A. No, sir.

Q. Was ever any demand made on you by the bank or any officer thereof to produce that receipt offered in evidence?

A. Well, I expect there was when I took the nugget out.

Q. Well, after the nugget was turned back to the bank. A. No, sir, there never was.

Q. Did ever any officer of the bank or anyone representing the bank ask you to deliver them this receipt? A. No, sir.

Q. That's the reason you kept it?

A. Yes, sir, it certainly is.

Q. And the nugget was still in the bank?

A. Yes, sir, and still belonged to me.

Q. Have you ever received from the Dome City Bank or any officer thereof a statement of your account with the bank in the last year?

A. No, sir, I never could get it.

Q. I ask you to examine this book offered in evidence as a part of the defense and marked Defendant's Exhibit "E," and state to the jury whether you have any recollection of ever having had that book in your possession.

A. (After examining.) I couldn't say that I do.

Q. Is there any mark on it by which you can identify it? A. No, sir, none.

Q. If you had such a book of that kind would it

(Testimony of J. L. Tobin.)

be in that good and clean a condition?

A. Well, I don't know; it would hardly seem possible. The one I had I had a long time, and it was more or less worn and weather-beaten.

Q. You would carry it around in your pocket?

A. O, yes—at times getting wet.

Q. Did you ever sign any receipt of any other acknowledgment to Margaret Mulrooney or anyone else representing the Dome City Bank that you had received this nugget or had received satisfaction for its value? A. No, sir.

Q. That is, prior to the time you sold it to Mrs. Barnett? A. No, sir.

Q. Did they ever make any demand on you to do anything of that kind?

A. No, sir, there never was a word of any kind mentioned in regard to it.

Q. You were out there on Dome Creek continuously up until July 22, 1908 from June, 1907?

A. Yes, sir, with the exception of a few days.

Q. You were operating there? A. Yes, sir.

Q. Did you, at any time, ever authorize Margaret Mulrooney either on the 7th day of July, 1908, or the 20th day of June or any other time, to take this nugget over from you and to transfer the title and possession from you to herself or the bank, and that in consideration that she should credit you on the books of the Dome City Bank with the value of the nugget at $1,283.16?

A. No, sir, there was never a word mentioned in regard to this nugget or anything of the kind.

(Testimony of J. L. Tobin.)

Mr. CLEGG.—That's all.

Cross-examination.

(By Mr. HEILIG.)

You had a book of this kind?

A. Yes, I think I did.

Q. That is, a book like it?

A. Similar to that, I should judge; yes, sir.

Q. This looks like the one the Dome City Bank gave you?

A. Yes, I should judge it is about the same thing.

Q. Now, it appears from this book that on the 28th day of April, 1907, you deposited 398.22 ounces of gold-dust and got credit for $6,678.56—did they write that amount in the book at that time?

A. I don't remember anything about those figures.

Q. You remember of going there with a deposit of nearly 400 ounces of dust in April of 1907?

A. No, I couldn't say that I do, although I made a number of large deposits there; as to the dates I couldn't say right now.

Q. No, I don't expect you to without referring to the book. A. No.

Q. I want to ask you whether whenever you went there with a deposit they made an entry—gave you credit.

A. I rather think they did—or should have if they didn't.

Q. That was the practice, was it not?

A. Yes, it should have been.

Q. Did they ever give you anything else to show

(Testimony of J. L. Tobin.)

what you had deposited there?

A. It was supposed to be put in the book, and I left my book at the bank most of the time.

Q. And the rest of the time, where did you have it?

A. I think I had it with me, off and on.

Q. Carrying it around in your pocket?

A. I expect I did, at least part of the time.

Q. All of the time?

A. No, I hardly think so.

Q. You were mining during this time?

A. Yes, sir.

Q. Actually mining—doing work yourself?

A. Yes, sir.

Q. Up and down the tunnels and drifts and shafts? A. Yes, sir.

Q. And had on your old clothes of course.

A. Certainly.

Q. You didn't carry your bank-book with you at that time?

A. I hardly think I did, around the mines.

Q. You say most of the time, however, you left it in the bank.

A. A good part of the time I'm sure, but at times I carried it.

Q. Did you, when this book was balanced up on the 8th day of August, 1907—there is a memorandum here which says 140 checks were cancelled and delivered you—you got those?

A. There was some delivered to me, and a great many that were not.

(Testimony of J. L. Tobin.)

Q. At the time—didn't you get all of the checks at the time?

A. Well, I could hardly say what time, at least at that particular time.

Q. This book says that in December—or August, 1907, the latter part of August, this book was balanced up again and 17 checks were returned to you—do you remember getting those?

A. No, I don't remember about getting them.

Q. You may have gotten those checks?

A. Yes, I may have.

Q. You have quite a lot of checks in your possession? A. Yes, sir.

Q. But there are some checks you didn't get back?

A. Yes, sir, I think there are a great many.

Q. Those are the checks for the last balance?

A. Yes, I dare say the last were not delivered; and there were many others to the best of my knowledge.

Q. That was during 1909?

A. No, sir, 1908.

Q. When did you last do any business with the bank?

A. I don't think I can give you the date.

Q. Now, in November, 1907, the bank-book was settled again and there were 87 cancelled checks?

A. What date?

Q. November of 1907, and 87 cancelled checks returned.

Objected to as incompetent, irrelevant and im-

(Testimony of J. L. Tobin.)

material and not the best evidence, and counsel is trying to have the witness verify a book prepared by the Dome City Bank.

The COURT.—It is an exhibit in the case; he may testify whether he knows anything about the statements made therein whether he received the cancelled checks or not.

Plaintiff excepts.

Mr. HEILIG.—I say, in November, the latter part of November, 1907, your bank-book was balanced again and 87 cancelled checks were returned to you?

A. I don't know whether they were or not.

Q. Do you know whether any were returned to you?

A. On that date not a thing about it; I know I received checks at different times—when and how many I can't tell you or give you any idea.

Q. Do you know Margaret Mulrooney's handwriting? A. Yes, sir, I think I do.

Q. Would you say this book was in the handwriting of Margaret Mulrooney?

Objected to as not redirect examination, immaterial and irrelevant.

Objection overruled. Exception.

A. Well, I don't know.

Q. It looks like it? A. Yes.

Q. Looks like her handwriting?

A. Yes, sir.

Q. You think it is?

A. I rather think it is.

Q. Do you remember of going down there to the

(Testimony of J. L. Tobin.)

bank with Miller Thosteson in June, 1908?

A. No, I do not.

Q. You heard him testify? A. I did.

Q. You were down there when he was there?

A. Yes, but I didn't go there with him—that's what you asked me—he came there himself while I was there.

Q. He came himself while you were there?

A. Yes, sir.

Q. You went there *there* first—that it?

A. Yes, sir.

Q. And you went there for the nugget?

A. Yes, sir.

Q. And asked about it? A. Yes, sir.

Q. And what did Margaret Mulrooney tell you?

A. Well, I don't remember the words, but as I believe I stated yesterday, that when I went for the nugget I told her what I was going to do with it and she said—or Mrs. Carbonneau, I wouldn't be certain which, that they would do better than that; that they would take the mortgage over that Thosteson held on some machinery at the time, and they told me at the time they would take the mortgage over.

Q. Was this said while Thosteson was there?

A. No, sir.

Q. What was said while Thosteson was there?

A. I don't remember; there wasn't much of anything said; to the best of my memory Mrs. Carbonneau or Miss Mulrooney stated to him that they had a mortgage on the nugget, and he didn't stop there more than a minute or two and went away.

(Testimony of J. L. Tobin.)

Q. Did you afterwards go for the nugget?

A. Did I afterwards?

Q. Yes.

A. No, sir, I expected them to do as they agreed with me, and when the time came and I saw they didn't have any intention of doing so, I sold this nugget and it belonged to me at the time.

Q. That is, you made a bill of sale of it.

A. Yes, sir.

Q. At the time you made this bill of sale had you squared up with Thosteson?

Objected to as not proper redirect examination incompetent and immaterial.

Objection sustained. Exception by defendant.

Redirect Examination.

(By Mr. CLEGG.)

Just one question I forgot to ask you before, Mr. Tobin: State to the jury what is the fact now as to whether you deposited or put this nugget in the safe deposit box at any time after June 7th, 1907, at the Dome City Bank, and tell them when you did have it there.

A. I had it in the safe deposit box for possibly a couple of days when it first came out of the ground; I dare say in and out for a couple of days—everybody wanted to see it, of course. Mr. Thosteson had it a day or two and I had it a day or two I believe. But it was never in the safe deposit box after I received that receipt when I put it on deposit.

Q. For safekeeping? A. Yes, sir.

Mr. CLEGG.—That's all.

(Testimony of J. L. Tobin.)

Recross-examination.

(By Mr. HEILIG.)

You say you never after you put it on deposit in the bank? A. Well, that's where I put it.

Q. You deposited it with the bank?

A. I did—at least thought I did when I took the receipt.

Q. And deposited it with the bank?

A. Yes, sir.

Q. And drew checks against it?

A. I never did.

Q. Didn't you overdraw your account?

A. According to their statements I did—according to their figures, but I don't think I ever did as a fact.

Q. And they told you they permitted it because the nugget was on deposit with them?

A. No, sir.

Q. You positively deny that? A. Yes, sir.

Mr. HEILIG.—That's all.

Mr. CLEGG.—That's all.

Plaintiff rests.

Defendant rests.

Whereupon counsel for plaintiff addressed the jury, and the defendant reserved its statement.

[Instructions Requested by Defendant.]

And be it further remembered, that immediately after the close of the testimony and the arguments of counsel were had in the above-entitled cause, the defendant herein requested the Court to instruct the jury as follows:

"The Court instructs you that in order to constitute the plaintiff a *bona fide* purchaser without notice and in good faith she must have actually paid the full price for the nugget in controversy at or before the time of such purchase, and that the acceptance by her of a bill of sale under the evidence in this case to secure the payment of an old debt due her by J. L. Tobin, does not constitute her a *bona fide* purchaser for value and without notice," which instruction the Court refused to give. To the refusal of the Court to give such instruction the defendant then and there excepted and its exception was allowed by the Court.

The defendant thereupon requested the Court to instruct the jury as follows:

"The Court instructs you that the fact that at the time the plaintiff claims to have purchased the nugget in controversy she knew that such nugget was not in the actual possession of J. L. Tobin was such notice to the plaintiff as required her to make inquiry as to the condition under which the nugget was actually held at the time by the party actually in possession thereof, and that the law presumes that she had such knowledge at the time she claims to have purchased the nugget as she could have acquired had she made such inquiry from the party actually in the possession thereof," which instruction the Court refused to give. To the refusal of the Court to give such instruction the defendant then and there excepted, and its exception was allowed by the Court.

The defendant thereupon requested the Court to instruct the jury as follows:

"The Court instructs you that the bill of sale to the plaintiff of the nugget in controversy to secure the payment of the debt then owing by J. L. Tobin to the plaintiff does not make the plaintiff a *bona fide* purchaser for value, it being admitted that at the time she claims to have purchaser such nugget she paid out no money therefor," which instruction the Court refused to give. To the refusal of the Court to give such instruction, the defendant then and there excepted and its exception was allowed by the Court.

The defendant thereupon requested the Court to instruct the jury as follows:

"The Court instructs you that the fact that at the time plaintiff claims to have received the bill of sale of the nugget from J. L. Tobin said Tobin did not have the actual possession and exhibited to the plaintiff a receipt dated June 12, 1907, from the Dome City Bank, acknowledging the receipt of the nugget is not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given, but that such receipt is open to explanation," which instruction the Court refused to give. To the refusal of the Court to give such instruction the defendant then and there excepted, and its exception was allowed by the Court.

The defendant thereupon requested the Court to instruct the jury as follows:

"The Court instructs you that the plaintiff's knowledge at the time she took the bill of sale, that the nugget in controversy was not in the actual possession of J. L. Tobin, and her knowledge that said nugget had been delivered to the Dome City Bank

on June 12, 1907, imposed upon the plaintiff the duty of inquiring from the said Dome City Bank, at or before she accepted said bill of sale as to the condition upon which they held such nugget at the time the bill of sale was given, and that the law presumes that at the time she accepted such bill of sale she had notice of all such facts as she would have learned had she made such inquiry at or before the time she accepted such bill of sale," which instruction the Court refused to give. To the refusal of the Court to give such instruction the defendant then and there excepted and its exception was allowed by the Court.

Whereupon the Court instructed the jury as follows:

[Instructions of Court to Jury.]

By the COURT. (Orally): Gentlemen of the Jury, no requests were made for written instructions and in this case the Court will instruct you orally and endeavor to define briefly the issues in this case and also the law which will guide the jury in their consideration of the issues.

I.

This is an action for the recovery of a certain gold nugget by the plaintiff from the defendant, the Dome City Bank. The complaint alleges that the value of the nugget was fourteen hundred dollars, and further that the plaintiff purchased the nugget from one J. L. Tobin on the 22d day of July, 1908; that thereafter and before the commencement of this action she made a demand upon the defendant which then, as she alleges, had the nugget in its possession on de-

posit or as bailee, and that the defendant refused to deliver the nugget, and she therefore brings this action for the recovery of said nugget or its value. The plaintiff also charges in her complaint that she has been damaged in the sum of five hundred dollars by reason of the wrongful withholding of said nugget from her by the defendant.

The defendant denies that the plaintiff has been damaged in the sum of five hundred dollars or any other sum whatsoever; and so far as the question of damages for the detention of the nugget in question is concerned, there has been no evidence adduced on the part of the plaintiff as to any damages sustained, and for that reason you cannot find that she is entitled to any damages by reason of the detention of the nugget by the defendant. If you find for the plaintiff under the evidence, you can only find that she is entitled to the nugget sued for or its money value without considering the $500 which she pleads as damages for the wrongful withholding of the nugget.

The defendant further answers and says that prior to the time the plaintiff claims to have purchased the nugget from Tobin, that the witness Tobin had sold said property to one Margaret C. Mulrooney, who was the cashier of the defendant corporation at that time. Defendant further claims that prior to the date when it claims the witness Tobin sold and delivered the property to Miss Mulrooney, the property had been delivered to the defendant bank as a pledge or as security for certain overdrafts which the witness Tobin at that time owed the bank. The issues

in the case therefore, Gentlemen of the Jury, are these:

First: Who was the owner of the nugget at the time the plaintiff claims to have purchased the same from Tobin?

Second: If at the date the nugget was sold to the plaintiff, and prior thereto, Tobin was the owner of the same and you find that to be a fact by a preponderance of the evidence as you will hereafter be instructed, then you will find for the plaintiff. If you do not find by the weight or preponderance of the evidence that the nugget at the time was the property of the said Tobin, but, on the contrary, you find that Miss Mulrooney had purchased the nugget from Tobin prior to that time—that is, prior to July 7, 1908, or in fact any time prior to the date the plaintiff claims to have purchased said nugget from Tobin, then your verdict must be for the defendant.

II.

The plaintiff in this case must recover on the strength of her own title to the property in question. She can't rely on the weakness of the defendant's title, and therefore, if it appears from the evidence that Miss Mulrooney owned the property at the time the plaintiff claims it was sold to her by Tobin, then your verdict must be for the defendant.

III.

I desire, also, Gentlemen, to give you some instructions which will guide you in weighing the evidence and arriving at a correct conclusion in applying the facts of the case to the law governing the same.

You are instructed that you are the sole judges of

all questions of fact and of the effect of the evidence, and of the weight to be given to the testimony of the witnesses; but your power in that respect is not arbitrary, but to be exercised by you with legal discretion and in subordination to the rules of evidence as laid down in these instructions.

In considering the evidence in this case, you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when their evidence does not produce conviction in your minds, against a lesser number of witnesses or other evidence that is satisfying to your minds. The weight of the evidence does not depend so much upon the number of witnesses who testify, as upon the character and probability of the facts stated by them, and the opportunity the witnesses had of seeing and knowing the facts stated by them.

If you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part or all of the testimony of such witness; and if you believe from the evidence that any witness has willfully testified falsely in this case, you are at liberty to reject any part or all of the testimony of such witness; but you are not bound so to do. You should reject the false part, and should give such weight to other parts as you deem they are justly entitled to receive. You should not fail to weigh and consider fairly and give proper effect to all evidence which you consider truthful.

IV.

In determining the credit you will give to any witness and the weight and value you will attach to his

testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against any of the parties to the suit; the probability or improbability of such witness' statements and the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony before you, and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within the knowledge of such witness.

It is your duty to give to the testimony of such and all of the witnesses such credit as you consider their testimony justly entitled to receive.

And in this connection you are instructed that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is within the power of the one side to produce and of the other to contradict; and therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering the same, then the evidence so offered should be viewed with distrust.

V.

There is some evidence in this case as to oral admissions on the part of some of the parties to this case, to persons who have appeared before you as witnesses. I charge you that owing to the infirmity of the human mind and the inability of witnesses to repeat the exact language of such oral admissions,

and to understand it correctly and repeat it with all its intended meaning, you are to view the evidence as to such oral admissions with caution; but if you shall find that such admissions were actually made by the persons alleged to have made the same, then you should consider them as candidly and fairly as any other evidence in the case and give them credit accordingly.

VI.

You are instructed that you should not consider any evidence sought to be introduced, but excluded by the Court, nor should you consider any evidence stricken from the record by the Court, nor should you take into account in making up your verdict any knowledge or information known to you not derived from the evidence given by the witnesses upon the stand.

Whatever verdict is warranted under the evidence and the instructions of the Court, you should return, as you have sworn so to do.

VII.

You are further instructed, Gentlemen of the Jury, that in this case as in every civil case tried before a jury, the jury and the Judge of the court have each separate functions to perform. It is your duty to hear all of the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of fact; it is the duty of the Court to decide all questions of law involved in the trial of the case, and to instruct you upon the law applicable to the facts and evidence in the case, and the law makes it your duty to accept as law what is laid down by the Court

as such in these instructions.

And since you are the sole judges of what facts are proven on the trial, you should not permit the remarks or argument of counsel to influence your judgment, except as the same conform to the facts proven or are reasonably deducible from the facts proven, and the law of the case as laid down in these instructions.

VIII.

You are further instructed that your verdict should be against the defendant in this case and in favor of the plaintiff, if you find and believe from a preponderance of the evidence that on the 22d day of July, 1908, the plaintiff purchased the nugget in controversy from the witness Tobin in good faith for a valuable consideration, and without any notice that the defendant claimed any right or title to the property in question, and that at the time of said alleged sale the said Tobin was the owner of said property.

IX.

What is meant by the weight or preponderance of the evidence is: That greater weight of evidence which is satisfying to the minds of the jury.

X.

But if you do not find by a preponderance of the evidence that the witness Tobin was the owner of the nugget sued for at the time he executed the bill of sale therefor to the plaintiff, then you are instructed that your verdict should be for the defendant, because if Tobin didn't own it at that time he could not convey any title to the plaintiff.

XI.

The Court instructs you that this is an action for the recovery of specific personal property, to wit, a gold nugget, and that in such case the plaintiff must recover upon the strength of her own title; and that it is sufficient that the defendant show the title was not in the plaintiff at the time the suit was brought; and it is a sufficient defense to the claim of the plaintiff if the defendant show title to the disputed property in itself or that the right of property to the nugget was in some one else beside the plaintiff—it being claimed in this case that the title to the nugget was in Miss Mulrooney.

XII.

In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant bank, which receipt, as you will observe by reading it, states that the nugget was held by the bank for safekeeping. The receipt is *prima facie* evidence of the truth of its contents; and said receipt, when delivered to the plaintiff, was *prima facie* evidence to the plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence; and therefore, if you believe from the evidence in this case that the nugget was actually sold to Miss Mulrooney by the witness Tobin before the plaintiff claims to have purchased the same, then your verdict must be for the defendant; and, as before stated, the plaintiff must recover on the strength of her own title and show by a preponderance of the evidence all

the material allegations of her complaint which constitutes her right to a recovery in this case; that is, that Tobin was the owner of the nugget at the time the plaintiff claims he sold it to her.

XIII.

The fact, however, that Tobin may have owed the bank other sums of money, is immaterial in this case, except as it might bear upon the question in what capacity the bank held the nugget; but if the bank merely held the nugget as bailee—that is, held the nugget for safekeeping—it would make no difference how much money Tobin might have owed the bank: That could not affect his right or power to transfer the nugget to the plaintiff, if he owned it at the time.

XIV.

You are further instructed that this is an action for the recovery of specific personal property, to wit, a gold nugget; and that if the jury finds by a preponderance of the evidence that at the time this action was commenced such property was not in the actual possession of the defendant, the Dome City Bank, but in the actual possession of some other person not a party to this action, the plaintiff cannot recover in this case and your verdict must be for the defendant.

XV.

In making up your verdict, Gentlemen, if you find for the plaintiff—that she is the owner of the nugget in controversy, your verdict should be in the alternative; that is, that she is the owner of the nugget and entitled to have the same delivered to her, or, in case the defendant is not able to produce the nugget

at this time, that she have judgment for the value of the nugget. It is claimed by the defendant that the nugget has been sent out of the jurisdiction of this court since the commencement of this action. That fact does not affect the right of the plaintiff to recover in this case. Your verdict will merely be in the alternative—if you find for the plaintiff, that she is entitled to judgment for the nugget, and in default of defendant in the production of the nugget she is entitled to recover whatever you find the value of the nugget to be. And the question of the value of the nugget is for you to determine under the evidence in this case. If you find for the plaintiff, and you believe from the evidence that it is impossible for the defendant to deliver the nugget, then you should determine from the evidence what was the value of the nugget at the time it was purchased by the plaintiff in this action from the witness Tobin.

XVI.

I think, Gentlemen, that covers the issues in this case. I instruct you, however, that only that special portion of the books offered in evidence as exhibits should be considered by you. I hand you two forms of verdict, the pleadings in this case, and the exhibits offered in evidence, excepting the depositions, and when you have agreed upon your verdict you will sign by your foreman that form upon which you have agreed and return it into Court as your verdict, together with the pleadings and exhibits in the case; and the other form of verdict you will destroy.

(After bailiffs are sworn.) You may now retire to consider of your verdict.

[Reporter's Certificate to Charge of Court to Jury.]

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

I hereby certify that the above and foregoing ten (10) pages of written and typewritten matter constitute a full, true and correct transcript of the charge of the Court to the jury in the cause of C. Barnett v. Dome City Bank, tried in the above-entitled court on February 10-11, 1910, as the same was delivered to the jury orally at the conclusion of the trial, and was taken down by me in shorthand and thereafter transcribed into typewritten longhand, and of the whole thereof.

Witness my hand at Fairbanks, Alaska, this 12th day of February, A. D. 1910.

L. R. GILLETTE,
Official Reporter for District Court, for Territory of Alaska, 4th Div.

[Defendant's Exceptions to Instructions of Court to Jury.]

And be it further remembered: That thereafter and on the same day, and upon the conclusion of the Court's charge to the jury in said cause, and before the retirement of the jury to consider of their verdict, the defendant excepted to instruction No. 8, which reads as follows: "You are further instructed that your verdict should be against the defendant in this case and in favor of the plaintiff, if you find and believe from the preponderance of the evidence that

on the 22d day of July, 1908, the plaintiff purchased the nugget in controversy from the witness Tobin in good faith for a valuable consideration, and without any notice that the defendant claimed any right or title to the property in question, and that at the time of said alleged sale the said Tobin was the owner of said property," for the reason that it excluded from the consideration of the jury the contention and evidence introduced by defendant that the nugget had been purchased by Margaret Mulrooney prior to said date and disregards the constructive notice of her right thereto arising from the fact that Tobin had not been in possession thereof for more than a year, and assumes that plaintiff paid a valuable consideration at the time she claims to have purchased the same.

Defendant excepted to Instruction No. 12, which reads as follows: "In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant bank, which receipt, as you will observe by reading it, states that the nugget was held by the bank for safekeeping. The receipt is *prima facie* evidence of the truth of its contents; the said receipt, when delivered to the plaintiff was *prima facie* evidence to the plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence; and therefore, if you believe from the evidence in this case that the nugget was actually sold to Miss Mulrooney by the witness Tobin before the plaintiff claims to have purchased

the same, then your verdict must be for the defendant; and, as before stated, the plaintiff must recover on the strength of her own title and show by a preponderance of the evidence all the material allegations of her complaint which constitute her right to a recovery in this case; that is, that Tobin was the owner of the nugget at the time the plaintiff claims he sold it to her," for the reason that it excludes from the consideration of the jury the duty of plaintiff to inquire from the defendant whether it still held the nugget in the capacity indicated in said receipt in view of the testimony of the plaintiff that she did not pay any money at the time she claims to have purchased the nugget and took the same as security for the payment of the debt then owing to her by the said Tobin.

[Plaintiff's Exhibit No. 1.]

BILL OF SALE.

KNOW ALL MEN BY THESE PRESENTS: That J. L. Tobin, of Dome, Alaska, for and in consideration of the sum of Fourteen Hundred Dollars, lawful money of the United States, to him in hand paid by Mrs. C. Barnett of the same place, the party of the second part, and for other valuable considerations, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part, her executors, administrators and assigns, one certain gold nugget weighing seventy-three and fifty-five one hundredths ounces, Troy weight.

TO HAVE AND TO HOLD the same to the said

party of the second part, her executors, administrators, and assigns forever. And I do for myself, my heirs, executors and administrators, covenant and agree to and with the said party of the second part, her executors, administrators and assigns, to warrant and defend the sale of the said property, goods, and chattels hereby made unto the said party of the second part, against all and every person and persons, whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this the 22d day of July, A. D. 1908.

J. L. TOBIN. [Seal]

In the presence of
J. E. COFFER.
OTTO NEMITZ.

United States of America,
Territory of Alaska,
Fairbanks Precinct,—ss.

This is to certify that on this 22d day of July, A. D. 1908, before me John E. Coffer, a Notary Public in and for the Territory of Alaska, duly commissioned and sworn, personally came J. L. Tobin to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[Seal] JOHN E. COFFER,
Notary Public in and for Alaska, Residing at Dome.

Indexed—Indexed—Bill of Sale—J. L. Tobin to C. Barnett—Dated July 22d, 1908. Territory of Alaska, Third Judicial Division, SS: Filed for Record at the request of Mrs. C. Barnett on the 24 day of July, 1908, at 15 minutes past 1 P. M. and recorded in Volume 1 of Bills of Sale, page 119, Fairbanks Recording District. J. A. Goodwin, Recorder, by Henry T. Ray, Deputy.

No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Plaintiff's Exhibit No. 1. Filed in open court Feb. 10, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Plaintiff's Exhibit No. 2.]

DOME CITY BANK

Dome City, Alaska, June 12, 1907.

RECEIVED from J. L. Tobin, One nugget weighing 73-55/100 ounces ~~dollars~~ for safekeeping.

M. C. MULROONEY, Cashier.

[Endorsed]: No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Plaintiff's Exhibit No. 2. Filed in open court, Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Plaintiff's Exhibit No. 3.]

May 3rd, 1908.

RECEIVED of Mrs. C. Barnett, Seventy-five Dollars for loan.

$75.00. J. L. TOBIN.

[Endorsed]: No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Plaintiff's Exhibit No. 3. Filed in open court Feb. 10, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Plaintiff's Exhibit No. 4.]

In the District Court for the Territory of Alaska, Third Division.

No. 1084.

MRS. C. BARNETT,

Plaintiff,

vs.

DOME CITY BANK,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of plaintiff says:

I.

Defendant admits each and every allegation contained in the first paragraph of said complaint.

II.

For answer to the allegations contained in the second paragraph of said complaint, defendant admits that on or about June 12, 1907, one J. L. Tobin, de-

posited with defendant, without hire, for safekeeping a gold nugget belonging to said Tobin, weighing 73.55 ounces, and denies that it was of any greater value than $1,283.16 (*$1383.00 superimposed by (*$1283.16 and denies each and every other allegation contained in said second paragraph.

III.

Defendant denies each and every allegation contained in paragraph three of said complaint.

IV.

Defendant admits that on or about July 22, 1908, the plaintiff demanded possession of said nugget from defendant and denies each and every other allegation contained in paragraph number four in said complaint.

And for a further and separate defense to the cause of action alleged in said complaint, defendant says:

I.

That on or about the 12th day of June, 1907, the defendant one J. L. Tobin deposited with this defendant and defendant received from the said Tobin, without hire, for safekeeping that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 (*$1383.00 (*$1283.16) and no more; that about thirty days thereafter the said Tobin came and requested the defendant to return the said nugget to him and the defendant then and there delivered the said nugget to the said Tobin who received and carried the same away from the possession of defendant.

And for a second further and separate defense to

the cause of action alleged in said complaint, defendant says:

I.

That on or about the 12th day of June, 1907, one J. L. Tobin deposited with this defendant and defendant received from the said Tobin without hire for safekeeping that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 and no more; that about thirty days thereafter the said Tobin came and requested the defendant to return the nugget to him and the defendant then and there delivered the said nugget to the said Tobin who received and carried the same away from the possession of defendant.

II.

That thereafter and about the last day of October, 1907, the said Tobin returned the said nugget and again deposited it with defendant, and being then and there desirous of obtaining advances of money on his check in excess of his deposit he then and there pledged the said nugget to the defendant bank upon an agreement with the bank that the said Tobin might draw money from the said bank in the amount of the value of said nugget; and long prior to the date of the alleged sale of the said nugget to the plaintiff the said Tobin drew against the value of the said nugget and this defendant paid him the full value thereof; that thereafter and about the month of June ("July" written over "June") 1908, the said Tobin duly sold and assigned the said nugget

Margaret Mulrooney

to ~~this defendant~~ and this defendant gave said Tobin

in consideration thereof due credit on the debt which he then owed to defendant Bank in the sum of the full value of the said nugget, to wit, the sum of ~~$1383.00~~ $1283.16.

Wherefore defendant prays that this defendant be dismissed hence with its costs and disbursements and have judgment against plaintiff therefor.

JAMES WICKERSHAM,
Attorney for Defendant.

Territory of Alaska,
Fairbanks Precinct,—ss.

Jesse Noble, being first duly sworn, deposes and says that he is the president and manager, and managing agent of the defendant company, the Dome City Bank; that the said Dome City Bank is a corporation organized under the laws of the State of Washington and that affiant is its president and general manager; that he has read the foregoing answer in the above-entitled cause, knows the contents thereof and believes the same to be true.

JESSE NOBLE.

Subscribed and sworn to before me this 16th day of January, 1909.

JAMES WICKERSHAM,
Notary Public in and for the Territory of Alaska,
Residing at Fairbanks.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Third Division. Mrs. C. Barnett vs. Dome City Bank, Defendant. Answer. Filed in the District Court, Territory of Alaska,

Third Div. Jan. 19, 1909. O. A. Wells, Clerk. James Wickersham, Attorney for Defendant.

No. 1084. In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Plaintiff's Exhibit No. 4. Filed in open court Feb. 10, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Defendant's Exhibit "B."]

COPY OF CASH-BOOK, DOME CITY BANK, PAGE 103, DEFENDANT'S EXHIBIT "B," CAUSE NO. 1084, MRS. C. BARNETTE vs. DOME CITY BANK.

DR.		CASH.			CASH.	CR.
July 7		Amount forward	38,311.70		Amt. forward	24,291.39
	159	Dep.	51.00	July 7	161 M. C. Mahooney	51.00
	150	Loan, J. L. Tobin, sold nugget	1,283.16		129 Margaret Mulrooney, T. D.	1,283.16
	171	Dust	7,166.07		159 Dep.	7,201.90
	164	Com on Dust	35.83		167 Fairbanks Bank Co. Dust Shipt July 4	7,265.05
	171	Dust Shipt July 3rd	7,265.05		227 Jesse Noble, Mrs. Meder	22.00
	161	M. C. Mulrooney, Salary 1 Mo.	150.00	6	150 Loan, Meder	50.00
	227	Jesse Noble, " " "	300.00		150 " Moor	75.
					167 F. B. Rem.	289.90
					159 Dep.	2,841.95
					167 F. B. Rem.	50.00
					167 " Rem	227.30
					167 " Rem	488.25
				7	175 Cashiers Bon Bank	38.00
					167 F. B. Rem	312.00
					167 " Rem	112.50
					167 " Rem	293.00
					167 " Rem	491.97
					171 Dust	44.37
					135 L E W & G Groceries	70.32
					227 Jesse Noble, Roth	50.00
					159 Dep.	3,807.45
					M. C. Mulrooney	50.00
					Int.	1.
					Margaret Mulrooney, T. D.	1,283.16
					Dep.	7,201.90
					163 Expense M. C. M.'s Salary June 8 to July 8	150.00
					163 Expense, Noble's Salary	300.00
					161 M. C. Mulrooney	3.15
July 8		.....	54,562.81		Balance, ...	4,753.00
		Balance	4,753.00			54,562.81

[Endorsed]: In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Defendant's Exhibit "B." Filed in Open Court, Feb. 12, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Defendant's Exhibit "C".]

COPY OF LEDGER, DOME CITY BANK, PAGE 129.

DEFENDANT'S EXHIBIT "C," CAUSE NO. 1084, MRS. C. BARNETT vs. DOME CITY BANK.

MULROONEY MARGARET (Time Deposit)

May 28.	Mrs. C. Agnes and James.....	1,918.01	Nov. 25–		20,000.
July 7.	Living Expense	1,283.16			
" 24.	Ck..... ....16,500.				
Aug. 8.	....	298.83			
		20,000.00			20,000.00

[Endorsed]: In the District Court. No. 1084. Mrs. C. Barnett vs. Dome City Bank. Defendant's Exhibit "C." Filed in open court Feb. 12, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

Defendant's Exhibit "D."

COPY OF LEDGER, DOME CITY BANK, PAGE 150, DEFENDANT'S EXHIBIT "D," CAUSE NO. 1084, MRS. C. BARNETT vs. DOME CITY BANK.

LOAN ACCOUNT.

April		For'd	73,108.89	June	6	For'd	16,459.94
April	11	Mante, V.	30.	"	"	Thomas	15.00
"	13	Carter, Dr.	250.	"	"	"	10.00
"	17	Cook & Co.	23.75	"	"	"	20.
"	29	Condon	132.50	"	6	D. Peterson	101.
"	20	Hedman	50.		8	Williams	210.13
May	6	Thomas	15.	"	"	Cook-Sargent	50.
	11	Cook & Co. T. C.	25.		"	Wms. 6b. Dome	117.45
	11	" & Sargent	50.		10	J. L. Tobin	200.
	15	Thomas	10.		"	Dr. Carter	100.
	16	Cleveland-Taylor	250.		13	Geo. Moor	90.78
May	7	Condon, T. C.	77.		15	Wms. 6b.	72.90
	18	" "	144.			H. & C.	1,020.
	19	" "	122.50		19	Williams	56.95
	21	Thomas, H.	20.		22	"	116.96
June	15	White & Green	600.		23	Hart Anderson	349.86
June	15	" "	600.		27	Williams	136.51
June	17	Neville	100.	July	1	J. B. C.	72.50
"	22	Cook	200.		2	Dr. Carter	75.
"	24	Moor	100.		"	Meder	50.
July	2	Palmer	75.75			Wenn	25.
"	6	Meder	50.		16	McDonald	100.
"	6	Moor Louis	75.		7	J. L. Tobin	1,283.16
	8	Cook	800.		8	Mente	30.
	24	Carroll	500.		10	H. R. T.	150.
	31	Neville & Co.	158.		11	L. Moor	100.
Aug.	3	Patterson	192.50			" "	75.
Aug.	8	Cook	125.		13	Wms.	66.72

10	Carter, Dr.	100.	
	H. R. Tayler		50.
	Peterson, D.		9.80
14	Smallwood		84.13
	Attwood		2.53
15	Wms.		80.41
	" May 28		167.04
	" May 2"		120.67
	" Jun 14		246.16
20	Smallwood Wms.		235.79
	Smallwood		209.62
	Wms.		121.21
	Cook		800.00
	Hilty		680.20
	Cook		200.
27	Smallwood		69.34
	Wms.		109.65
30	H. R. Taylor		50.
31	Smallwood		278.31
"	"		253.96
Aug. 3	Patterson		1,000.
4	Wms.		103.14
	Klud		37.50
	McG. & 3		572.
10	Smallwood		204.34
	Schmidt		198.39
	Wms.		183.94
	Mc.		48.
	Smallwood		448.44
		77,984.89	27,719.43

[Endorsed]: In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett vs. Dome City Bank. Defendant's Exhibit "D." Filed in Open Court, Feb. 12, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

Defendant's Exhibit "E."

DOME CITY BANK
In Account With J. L. TOBIN.
#1 a Dome
Double page 1.

DR. DOME CITY BANK IN ACC'T WITH J. L. TOBIN CR.

	1907						3,015.48	5,006.18
Apr.	28	398.72/100	@ 16.75	6,678.56	11		386	218
	29	82.29	" "	1,378.35	219		32.65	440
May	8	445	@ 16¾	7,453.75	33.75		45.50	276.25
May	"	Bal ⅝		108.55	25		12	1560.
"	"	Bal on 4/28 & 29		60.12	115.50		10.	55.
"	15	133.07	@ 17	2,262.19	166.		34	35
"	28	167.80	@ 17	2,852.60	25		170	48
Aug	2	287.40	@ 17	4,885.80	100		25	20
June	3	Dep Tobin for Lindsay						
		"	& N.—	3,000.	25		199.50	150
July	1	41.39	@ 17/206	732.60	110		69.50	104
	15	56.53	@ 17.70 206	1,003.41	132		30	153
					45		25	40
					13.50		290	10
					45.73		31.30	12
					17.		25.	186.50
					100.		14.25	100.
					330		75.75	30
					400		25	39.50
					671.75		53.75	692.89
					182.25		281.50	32.50
					250.		155.	25.
Aug 7		For'd		30,415.93		3,015.48	5,006.18	9,233.82

Defendant's Exhibit "E."

Double page 2.

DR. DOME CITY BANK ACC'T WITH J. L. TOBIN CR.

Aug 7	For'd #1	30,415.93	9,233.82	10,895.07	13,515.82
			58.50	75.	30.
			100.	55.50	800.
			18.	20.	1,532.22
			46.50	362.25	3,000.
			240.	25.	1,544.
			20.	200.	6,809.66
			88.	20.	13.25
			50.	50	50
			252.	127.50	40.
			30.	8.25	25
			30	145.75	114
			20	12.50	20
			25	157.75	25
			30	50.	25
			25	479.50	100
			133	80.	150
			71	25	100
			251.25	82.50	270
			145.	10.	34.25
			12.75	234.25	52.52
			15.	400.	200.
			10,895.07	13,515.82	28,450.70

Defendant's Exhibit "E."

Double page 3.

DR. DOME CITY BANK ACC'T WITH J. L. TOBIN CR.

Aug.	8	For'd	30,415.93	Aug.	8	Ford	28,450.70
	8	Balance	677.31				200.
							112.50
							84.
							111.50
							25.
		One hundred forty cancelled vouchers herewith. M. C. M.					25.
							110.20
							20.
							105.
							844.39
							800.
							94.50
							85.45
							25.
1907			31,093.24				31,093.24
Aug	13	216.93 @ 17	3,687.81	Aug.	8	Bal on o/d	677.31
							268.
							20.
							20.
							154.
							1,894.
			3,687.81				3,033.31

Defendant's Exhibit "E."

Double page 4.

DR. DOME CITY BANK ACC'T WITH J. L. TOBIN CR.

1907	For'd	3,687.81		for'd	3,033.31
					.31.50
					35.
					12.
					353.75
	Seventeen vouchers herewith. M.				43.
					21.
					20.
					9
					20
					20
					25
					36
			Aug 13	Balance	58.25
		3,687.81			3,687.81
Aug 13	Balance	58.25	Aug 13	Additional N & L	71.75
Aug 19	123.09 @ 17	2,092.53			25.
Aug 21	100.59 @ 17	1,710.03			400.
Aug 30	Dep	80.			50.
~~July 15~~	~~56.53. .17.75 M~~	~~1,003.41~~			144.
Aug 15	99.20 @ 17.76 M	1,761.79			31.25
" 15	N & L Royalty	145.63			81.75
	For'd	5,848.23			803.75

Defendant's Exhibit "E."

Double page 5.

DR.	DOME CITY BANK ACC'T WITH J. L. TOBIN		CR.	
Sept 17	Forward..... ....5,848.23	Sept 17	Forward....3,241.11	
Sept "	63 @ 17.70.....1,115.10	For'd....	803.75	63.
			20.	92.75
			13.50	17.50
			80.20	200.
			15.	18.
			166.50	15.
			1,137.81	50.
			100.	84.50
			30.	250.
			100.	167.
			45.10	10.25
Sixty-nine cancelled vouchers herewith. M. C. M.			55.30	80.
			20.	42.75
			10.	45.
			100.	72.
			218.26	161.
			12.25	75.
			20.	69.
			20.	20.
			93.44	8.
			100.	250.
			80.	
	Forward..... ....6,963.33		3,241.11	5,031.86

Defendant's Exhibit "E."

Double page 6.

DOME CITY BANK ACC'T WITH J. L. TOBIN

DR.			CR.		
Sept 17	Bro't for'd	6,963.33		Forward	5,031.86
Sept 17	O/D	1,739.53			24.
					70.50
					89.
					65.
					123.
					1,778.
					50.
					60.50
					39.50
					20.
					62.
					275.
					103.80
					100.
					196.75
					50.
					25.
					25.
					15.95
					400.
					98.
		8,702.86			8,702.86

Defendant's Exhibit "E."

Double page 7.

DR. DOME CITY BANK ACC'T WITH J. L. TOBIN CR.

1907				1907		
Sept	19	81.73 @ 17.70	1,446.62	Sept 17	O/D	1,739.53
Oct	1	109.46 @ 17.70	1,937.44		Int	55.26
"	10	116.89 @ 17.70	2,068.60			205.80
"	"	D of L & N 19.20	339.84			15.
"	26	141.52 @ 17.70	2,504.90			42.80
		23.49 D L & N	415.77			25.
Nov.	6	Lay	491.18			633.30
"	6	D L & N	54.50			186.40
						317.90
						176.50
						300.
						266.
						1,595.
						66.
						121.06
						100.
						60.
						25.
						25.
						106.25
						182.
						91.
		Forward	9,258.85			Forward 6,334.80

Defendant's Exhibit "E."

Double page 8.

Bro't For'd.	9,258.85	6,334.80	7,654.96	10,211.71
		94.25	21.75	127.
		31.20	567.	44.50
		300.	72.	36.80
		6.25	25.	14.
		50.	50.	100.
		33.	153.60	12.
		25.	111.25	25.
		129.	50.	100.
		241.75	25.80	50.
		36.	100.	32.25
Eighty-seven cancelled vouchers herewith. M. C. M.		50.	198.40	600.
		50.50	20.	107.
		35.50	50.	24.
		23.36	35.	107.75
		30.	327.	7.80
		9.25	79.20	100.
		50.	100.	25.
		9.	50.	60.
		25.	15.	12.
		33.10	285.	100.
		8.	52.75	77.40
		50.	168.	125.
	9,258.85	7,654.96	10,211.71	12,099.21

Defendant's Exhibit "E."

Double page 9.

Nov. 20.	Bro't. For'd	9,258.85		Brot. for'd	12,099.21
" "	Balance	2,968.76			25.
				Int. on O/D for 2 mos.	103.40
		12,227.61			12,227.61
June 11	67.90 @ 17.60 M	1,195.04	Nov. 20.	Balance on O/D	2,968.76
12	10. @ 17.60	176.			100.
May 28	69.62 @ 17.	1,218.35			210.
" "	Bal. assay	6.85			50.
June 19	Ck.	400.			100.
June 25	O/D	3,517.15			25.
					300.
					150.
					25.
					15.
					10.
					25.
					66.
					20.
					110.50
					5.
					25.
					10.
		6,513.39			4,215.26

Defendant's Exhibit "E."

Double page 10.

			For'd.	6,513.39	For'd.	4,215.26	5,402.26
						20.	10.
						280.	24.
						50.	145.
			Forty cancelled vouchers herewith M. C. M.			48.	25.
						187.	25.
						200.	130.
						25.	214.
						25.	37.
						48.	50.
						30.	20.
						48.	Int. 7 Mo. 431.13
						226.	
							6,513.39
July	1.	70.88 @ 17.60		1.247.50	June 25	Overdraft	3,517.15
"	11	Nugget		1.283.16		32. 150.	
"	14.	Overdraft.....		3.073.49		250.00 25.50	
						129.50 100.00	
						16.00 100.00	
						50.00 100.00	
						10.00 25.00	
						50.00 300.00	
			Twenty-three vouchers.			200.00 100.00	
						20.00 209.50	
						12.50 50.	
						107.00 25.	
						25.	2,087.00
				5,604.15			5,604.15

Defendant's Exhibit "E."

Double page 11.

July 14	O Draft	3,073.49
	Ck.	30.

[Endorsed]: In the District Court, Territory of Alaska, 4th Division. Mrs. C. Barnett, vs. Dome City Bank. Defendant's Exhibit "E." Filed in Open Court, Feb. 12, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

Thereupon two bailiffs were duly sworn by the Clerk according to law to take charge of the jury, and, at the request of the attorneys for the respective parties to said action the pleadings, exhibits and two forms of verdict were given to the jury, and thereupon the jury retired in charge of said two bailiffs to deliberate of their verdict; that the jury subsequently returned into court and through their foreman rendered the following verdict, which was by them declared to be their verdict, to wit:

"[Title of Court and Cause.]

Verdict.

We, the jury duly impaneled and sworn to hear, try, and determine the issues in the above-entitled action do hereby return and find a verdict for the plaintiff and against the defendant, and that the plaintiff is the owner and entitled to the immediate and exclusive possession of a large gold nugget, weighing seventy-three and fifty-five one-hundredths ounces, of the value of thirteen hundred eighty-three dollars, described in the complaint herein; that the plaintiff recover from the defendant possession of the same, and, if recovery thereof cannot be had, that the plaintiff have judgment against the defendant for the sum of $1,250.35.

Dated at Fairbanks, Alaska, this 11 day of February, A. D. one thousand nine hundred ten.

THOMAS L. JOHNSON,
Foreman."

[Title of Court and Cause.]

Motion for New Trial.

Comes now the defendant and moves the Court for an order setting aside the verdict rendered by the jury in this action on the 11th day of February, 1910, and granting a new trial of said action upon the following grounds, to wit:

1. Insufficiency of the evidence to justify the verdict.

2. That said verdict is against law.

3. Errors in law occurring at the trial and excepted to by the defendant as follows, to wit:

4. The Court erred in instructing the jury as follows: "You are further instructed that your verdict should be against the defendant in this case and in favor of the plaintiff, if you find and believe from the preponderance of the evidence that on the 22d day of July, 1908, the plaintiff purchased the nugget in controversy from the witness Tobin in good faith for a valuable consideration, without any notice that the defendant claimed any right or title to the property in question, and that at the time of said alleged sale he said Tobin was the owner of said property."

5. The Court erred in instructing the jury as follows: "In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant Bank, which receipt as you will observe by reading it, states that the nugget was held by the bank for sakekeeping. The receipt in *prima*

facie evidence of the truth of its contents; and said receipt, when delivered to the plaintiff, was *prima facie* evidence to the plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence; and therefore, if you believe from the evidence in this case that the nugget was actually sold to Miss Mulrooney by the witness Tobin before the plaintiff claims to have purchased the same, then your verdict must be for the defendant; and, as before stated, the plaintiff must recover on the strength of her own title and show by a preponderance of the evidence all the material allegations of her complaint which constitute her right to a recovery in this case; that is, that Tobin was the owner of the nugget at the time the plaintiff claims *to sold* it to her."

6. The Court erred in refusing to give the following instructions to the jury requested by the defendant, to wit: "The Court instructs you that in order to constitute the plaintiff a *bona fide* purchaser without notice and in good faith she must have actually paid the full price for the nugget in controversy at or before the time of such purchase and that the acceptance by her of a bill of sale under the evidence in this case to secure the payment of an old debt due her by J. L. Tobin does not constitute her a *bona fide* purchaser for value and without notice."

7. The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: "The Court instructs you that the

fact that at the time plaintiff claims to have purchased the nugget in controversy she knew that such nugget was not in the actual possession of J. L. Tobin was such notice to plaintiff as required her to make inquiry as to the condition under which the nugget was actually held at the time by the party actually in possession thereof, and that the law presumes that she had such knowledge at the time she claims to have purchased the nugget as she could have acquired and she made such inquiry from the party actually in the possession thereof."

8. The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: "The Court instructs you that the bill of sale to the plaintiff of the nugget in controversy to secure the payment of the debt then owing by J. L. Tobin to the plaintiff does not make the plaintiff a *bona fide* purchaser for value, it being admitted that at the time she claims to have purchased such nugget she paid out no money therefor."

9. The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: "The Court instructs you that the fact that at the time plaintiff claims to have received the bill of sale of the nugget from J. L. Tobin said Tobin did not have the actual possession of the nugget, but had in his possession and exhibited to the plaintiff a receipt dated June 12, 1907, from the Dome City Bank, acknowledging the receipt of the nugget is not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given but that such receipt is open to explanation."

10. The Court erred in refusing to give the following instruction to the jury requested by the defendant, to wit: "The Court instructs you that the plaintiff's knowledge, at the time she took the bill of sale, that the nugget in controversy was not in the actual possession of J. L. Tobin, and her knowledge that said nugget had been delivered to the Dome City Bank on June 12, 1907, imposed upon the plaintiff the duty of inquiring from the said Dome City Bank, at or before she accepted said bill of sale as to the condition upon which they held such nugget at the time the bill of sale was given, and that the law presumes that at the time she accepted such bill of sale she had notice of all such facts as she would have learned had she made such inquiry at or before the time she accepted such bill of sale."

WICKERSHAM, HEILIG & RODEN,
Attys. for Dft.

[Title of Court and Cause.]

[Recital Re] Denial of Motion for New Trial, etc.

Be it further remembered: That on the —— day of February, 1910, said motion for a new trial came on to be heard in open court in the presence of the attorneys for plaintiff and defendant, respectively; that after hearing said motion and argument of counsel and the Court having duly considered the same, the Court then and there denied and overruled said motion, to which order denying and overruling defendant's motion for a new trial, defendant then and there duly excepted and an exception was allowed.

Be it further remembered that the foregoing evidence is all of the evidence, testimony, and proof introduced by either party upon the trial of said action and that there was no other or further evidence, testimony, or proof introduced or given upon said trial.

And now the defendant tenders this its Bill of Exceptions to the action of the Court in the above-entitled cause and prays that the same may be settled, allowed, signed, and sealed by the Court and made a part of the record in this action according to law and the practice of this court.

Dated at Fairbanks, Alaska, on the 18 day of March, 1910.

WICKERSHAM, HEILIG & RODEN,
Attorneys for Defendant.

Service of a copy of the foregoing bill of exceptions on this 18 day of March, 1910, is hereby admitted.

CECIL H. CLEGG,
Attorney for Plaintiff.

[Title of Court and Cause.]

Order Settling and Allowing Bill of Exceptions.

Now, on this 23 day of March, 1910, the above-named defendant, by its attorney, duly presented in open court the foregoing Bill of Exceptions in the above-entitled action in the presence of the attorneys for plaintiff, for settlement and allowance in the manner prescribed by law and the practice of this Court, the said bill of exceptions consisting of 183 pages attached hereto.

And it appearing to the Court that said bill of exceptions was duly served and filed within the time allowed by the orders of this Court heretofore duly made and entered in the said action, and that the same is in all respects true and correct, and contains all of the testimony, evidence, and exhibits introduced by either party, plaintiff and defendant, upon the trial of said action, together with all and singular the proceedings in said cause not of record therein and that no other evidence, testimony, exhibits, affidavits, or other proof whatsoever were introduced by either of the parties, plaintiff or defendant upon said trial or upon the motion for a new trial herein, and the Court being fully advised in the premises,—

IT IS HEREBY ORDERED AND ADJUDGED: That said bill of exceptions of the defendant in the above-entitled action, consisting of 183 pages, attached hereto and containing all of the testimony, exhibits, affidavits, and other proof introduced upon the trial of said cause and upon the motion for a new trial therein as aforesaid, and said bill of exceptions being found to be true and correct in all particulars, the same is hereby settled, allowed, and signed as the bill of exceptions in said cause and is ordered to be made a part of the record in the case.

Done in open court at Fairbanks, Alaska, the 23d day of March, 1910.

THOMAS R. LYONS,
Judge District Court for the Territory of Alaska, Fourth Division.

Service of a copy of the foregoing Bill of Excep-

tions is hereby admitted this —— day of March, 1910.

_____,

Attorneys for Plaintiff.

Filed in open court Mar. 23, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

The Dome City Bank, defendant in the above-entitled cause, feeling itself aggrieved by the judgment made and entered in the above-entitled court and cause on the 17th day of February, 1910, comes now by Messrs. Wickersham, Heilig & Roden, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of such writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

WICKERSHAM, HEILIG & RODEN,

Attorneys for Defendant.

Service of the foregoing petition for writ of error and order is hereby admitted at Fairbanks, Alaska, this 25 day of February, 1910.

CECIL H. CLEGG,
Attorney for Plaintiff.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Petition for Writ of Error. Filed in open court Feb. 25, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorney for Defendant.

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant in the above-entitled cause, being the plaintiff in error, and assigns the following errors as having been committed by the above-entitled court on the trial of the above-entitled action, which errors the said defendant intends to and does rely upon on its writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit.

1. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that in order to constitute the plaintiff a *bona fide* purchaser without notice and in good faith she must have actually paid the full price for the nugget in controversy at or before the time of such purchase, and that the accept-

ance by her of a bill of sale under the evidence in this case to secure the payment of an old debt due her by J. L. Tobin does not constitute her a *bona fide* purchaser for value and without notice."

2. The Court erred in refusing to instruct the jury as requested on behalf of the defendant as follows: "The Court instructs you that the fact that at the time plaintiff claims to have purchased the nugget in controversy she knew that such nugget was not in the actual possession of J. L. Tobin was such notice to plaintiff as required her to make inquiry as to the condition under which the nugget was actually held at the time by the party actually in possession thereof, and that the law presumes that she had such knowledge at the time she claims to have purchased the nugget as she could have acquired had she made such inquiry from the party actually in the possession thereof."

3. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that the bill of sale to the plaintiff of the nugget in controversy to secure the payment of the debt then owing by J. L. Tobin to the plaintiff does not make the plaintiff a *bona fide* purchaser for value, it being admitted that at the time she claims to have purchased such nugget she paid out no money therefor."

4. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that the fact that at the time plaintiff claims to have received the bill of sale of the nugget from J. L. Tobin, said Tobin did

not have the actual possession of the nugget, but had in his possession and exhibited to the plaintiff a receipt dated June 12, 1907, from the Dome City Bank, acknowledging the receipt of the nugget is not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given, but that such receipt is open to explanation.

5. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that the plaintiff's knowledge, at the time she took the bill of sale, that the nugget in controversy was not in the actual possession of J. L. Tobin, and her knowledge that said nugget had been delivered to the Dome City Bank on June 12, 1907, imposed upon the plaintiff the duty of inquiring from the said Dome City Bank, at or before she accepted said bill of sale as to the condition upon which they held such nugget at the time the bill of sale was given, and that the law presumes that at the time she accepted such bill of sale she had notice of all such facts as she would have learned had she made such inquiry at or before the time she accepted such bill of sale."

6. The Court erred in instructing the jury as contained in instruction No. 8, in the Court's instructions to the jury which is as follows: "You are further instructed that your verdict should be against the defendant in this case and in favor of the plaintiff, if you find and believe from the preponderance of the evidence that on the 22d day of July, 1908, the plaintiff purchased the nugget in con-

troversy from the witness Tobin in good faith for a valuable consideration, and without any notice that the defendant claimed any right or title to the property in question, and that at the time of said alleged sale the said Tobin was the owner of said property."

7. The Court erred in instructing the jury as contained in instruction No. 8, in the Court's instructions to the jury, which is as follows: "In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant bank, which receipt, as you will observe by reading it, states that the nugget was held by the bank for safekeeping. The receipt is *prima facie* evidence of the truth of its contents; the said receipt, when delivered to the plaintiff, was *prima facie* evidence to the plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence; and therefore, if you believe from the evidence in this case that the nugget was actually sold to Miss Mulrooney by the witness Tobin before the plaintiff claims to have purchased the same, then your verdict must be for the defendant; and, as before stated, the plaintiff must recover on the strength of her own title and show by a preponderance of the evidence all the material allegations of her complaint, which constitute her right to a recovery in this case; that is, that Tobin was the owner of the nugget at the time the plaintiff claims he sold it to her."

8. The Court erred in rendering and entering a judgment in favor of the plaintiff and against the

defendant to the effect: "That the plaintiff Mrs. C. Barnett is the owner and entitled to the immediate and exclusive possession of that certain gold nugget described in the complaint in this action, to wit, that certain large gold nugget weighing seventy-three and fifty-five one-hundredths ounces, of the value of twelve hundred fifty dollars and thirty-five cents, and that said plaintiff recover of and from the defendant immediate possession of the same, and, if recovery thereof cannot be had, it is hereby ordered, adjudged, and decreed that the plaintiff do have and recover of and from the defendant, the Dome City Bank, a corporation, the value thereof as assessed by the said jury in their said verdict aforesaid, to wit, the sum of twelve hundred fifty dollars and thirty-five cents, in lawful money of the United States of America, and further that the plaintiff do have and recover of and from the defendant her costs and disbursements, taxed at the sum of ———— dollars, in this action laid out and expended."

Wherefore defendant prays that the judgment entered in the above-entitled action may be reversed, and that it be restored to all things which it has lost thereby.

WICKERSHAM, HEILIG & RODEN,
Attorneys for Defendant.

Received copy, February 25, 1910.

CECIL H. CLEGG,
Attorney for Plaintiff.

[Endorsements]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Cor-

poration, Defendant. Assignment of Errors. Filed in open court Feb. 25, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Allowing Writ of Error, etc.

Upon motion of Messrs. Wickersham, Heilig & Roden, attorneys for the defendant, and the filing of a petition for a writ of error and assignment of errors,

IT IS ORDERED: That a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein, and that the amount of bond on said Writ of Error be and hereby is fixed at one thousand eight hundred ($1800.00) dollars.

Dated February 25, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 772.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Order Allowing Writ of Error, etc. Filed in open court Feb. 25, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Writ of Error [Copy].

United States of America,—ss.

The President of the United States of America, to the Honorable Thomas R. Lyons, Judge of the United States District Court for the Fourth Division of the Territory of Alaska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court for the Fourth Division of the Territory of Alaska, before you, between Mrs. C. Barnett, as plaintiff, and Dome City Bank, as defendant, a manifest error has happened to the great prejudice and damage of the said defendant, said Dome City Bank, as is said and appears by the petition herein,—

We, being willing that error, if any hath been made, shall be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, together with this writ so as to have the same at the said place in said circuit on the 27 day of March, 1910, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those

errors what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States this the 25 day of February, 1910.

E. H. MACK,
Clerk of the District Court for the Fourth Division of the Territory of Alaska.

By E. A. Henderson,
Deputy.

Allowed this 25 day of February, 1910.

THOMAS R. LYONS,
Judge of the District Court for the Fourth Division of the Territory of Alaska.

Service of the within and foregoing writ of error by receipt of a copy thereof is hereby admitted at Fairbanks, Alaska, this 25th day of February, 1910.

CECIL H. CLEGG,
Attorney for Plaintiff.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Writ of Error. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendant, Dome City Bank, having this day filed its petition for a writ of error from the judgment made and entered herein to the United States

Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings of this Court be suspended and stayed until the determination of said Writ of Error by said Circuit Court of Appeals for the Ninth Circuit, and said petition having this day been allowed,—

NOW, THEREFORE IT IS ORDERED: That upon the defendant above named filing with the Clerk of this Court a good and sufficient bond in the sum of One Thousand Eight Hundred Dollars, to the effect that if the said defendant and plaintiff in error shall prosecute said writ of error to effect and answer all damages and costs if it fails to make its plea good then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by this Court—that all further proceedings in this Court be and they are hereby suspended and stayed until the determination of said writ of error by the said Circuit Court of Appeals.

Dated this 25 day of February, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 772.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Order Relative to Supersedeas Bond on Writ of Error. Filed in open court Feb.

25, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy. James Wickersham, Heilig & Roden, Attorney for Defendant.

[Title of Court and Cause.]

Citation [Copy].

United States of America,—ss.

The President of the United States of America, to Mrs. C. Barnett and to Cecil H. Clegg, Her Attorney, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error filed in the office of the clerk of the District Court for the Fourth Division of the Territory of Alaska, wherein Mrs. C. Barnett is defendant in error and the Dome City Bank is plaintiff in error, and show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States of America, this 25 day of February, 1910.

THOMAS R. LYONS,

District Judge, Presiding in the District Court for the Fourth Division of the Territory of Alaska.

Service of the foregoing citation is hereby admitted by receipt of a copy thereof this 25 day of February, 1910.

CECIL H. CLEGG,
Attorney for Plaintiff.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Citation. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Bond on Writ of Error.

Know All Men by These Presents: That the Dome City Bank, a corporation, as principal, and Thomas M. Gilmore and Peter Vidovich, both residents of the town of Fairbanks, Alaska, as sureties, are held and firmly bound unto Mrs. C. Barnett, the plaintiff above named, in the sum of Eighteen Hundred Dollars, to be paid to the plaintiff, her heirs, executors, administrators or assigns, and for such payment well and truly to be made we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and seals and dated this 25th day of February, nineteen hundred and ten.

Whereas on the 17th day of February, 1910, in the District Court in and for the Fourth Division of the Territory of Alaska, in a suit pending in said court between Mrs. C. Barnett as plaintiff and the Dome

City Bank as defendant, a judgment was rendered against the said Dome City Bank, defendant, and said defendant has sued out a writ of error from said District Court to the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and has procured the issuance of a citation directed to the said Mrs. C. Barnett, citing and admonishing her to be and appear at a session of said United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, on the 27th day of March, 1910; and

Whereas the plaintiff in error desires a stay of execution in the above-entitled cause pending the above appeal,—

Now, therefore, the condition of the above obligation is such that if the above-named defendant, Dome City Bank, shall prosecute said writ of error to effect and answer and pay all judgments, damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

DOME CITY BANK. [Seal]
By JESSE NOBLE, Pres. [Seal]
THOMAS M. GILMORE. [Seal]
PETER VIDOVICH. [Seal]

Signed, sealed and delivered in the presence of:
ALBERT R. HEILIG.
G. A. JEFFERY.

United States of America,
Territory of Alaska,—ss.

Thomas M. Gilmore and Peter Vidovich, being first duly sworn, each for himself, and not one for the other, doth depose and say:

That he is one of the sureties on the within and foregoing appeal and supersedeas bond; that he is a resident within the Territory of Alaska; that he is not an attorney or counselor at law, marshal, deputy marshal, commissioner, clerk of the court, or other officer of any court, and that he is worth the amount specified in the foregoing bond over and above all debts and liabilities and exclusive of property exempt from execution.

THOMAS M. GILMORE.
PETER VIDOVICH.

Subscribed and sworn to before me this 25 day of February, 1910.

[Notary Seal] ALBERT R. HEILIG,
Notary Public in and for the District of Alaska.

The above bond is hereby approved this 25th day of February, 1910.

THOMAS R. LYONS,
District Judge.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Bond on Writ of Error. Filed in open court Feb. 25, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson,

Deputy. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Extending Time [to April 25, 1910] to Perfect Appeal, etc.

On this 25 day of February, 1910, the above-entitled cause came on to be heard before the Judge of the above-entitled court upon the application of the defendant herein for an order extending the return day, the parties appearing by their respective attorneys, and it appearing to the Court that it is necessary owing to the great distance from Fairbanks to San Francisco, California, and the slow and uncertain communication between said points, that an order extending the time in which to docket said cause and to file the record therein with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, should be extended until the 25 day of April, 1910, and the Court being fully advised in the premises and believing good cause exists therefor—

IT IS HEREBY ORDERED that the time within which the said appellant shall perfect said case on appeal and file the record thereof and docket said cause with the clerk of said Circuit Court of Appeals be and the same is hereby enlarged and extended to and including the 25 day of April, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 772.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Order Extending Time to Perfect Appeal. James Wickersham, Heilig & Roden, Attorneys for Defendant.

[Title of Court and Cause.]

Order Extending Time [to May 25, 1910] to Perfect Appeal, etc.

On this 4th day of April, 1910, the above-entitled cause came on to be heard before the Judge of the above-entitled court upon the application of the defendant herein for an order further extending the return day, the parties appearing by their respective attorneys, and it appearing to the Court that it is necessary, owing to the great distance from Fairbanks to San Francisco, California, and the slow and uncertain communication between said points, that an order extending the time in which to docket said cause and to file the record therein with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit should be extended until the 25th day of May, 1910, and the Court being fully advised in the premises and believing good cause exists therefor—

IT IS HEREBY ORDERED that the time within which the said appellant shall perfect said case on appeal and file the record thereof and docket said cause with the clerk of said Circuit Court of Appeals

be and the same is hereby enlarged and extended to and including the 25th day of May, 1910.

THOMAS R. LYONS,
District Judge.

Entered in Court Journal No. 9, page 882.

[Endorsed]: In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Order Extending Time to Perfect Appeal. Filed in Open Court Apr. 5, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Title of Court and Cause.]

Praecipe for Transcript.

To the Clerk of the Above-named Court:

Please prepare transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, under the writ of error heretofore perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

Complaint.
Answer.
Reply.
Judgment.
Bill of Exceptions.
Petition for Writ of Error.
Assignment of Errors.
Order Allowing Writ of Error.

Writ of Error (Original).
Order Relative to Supersedeas Bond.
Citation (Original).
Bond.
Order Extending Time (Original).
Stipulation Relative to Printing Record.

Said transcript to be prepared as required by law and the rules of this court and of the said United States Circuit Court of Appeals for the Ninth Circuit, and on file in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, on or before the 25th day of April, A. D. 1910.

WICKERSHAM, HEILIG & RODEN,
Attorneys for Defendant and Appellant.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. C. Barnett, Plaintiff vs. Dome City Bank, a Corporation, Defendant. Praecipe for Transcript. Filed in the District Court, Territory of Alaska, 4th Div. Apr. 2, 1910. E. H. Mack, Clerk. By G. F. Gates, Deputy. James Wickersham, Heilig & Roden, Attorney for Defendant and Appellant.

[Title of Court and Cause.]

Stipulation Relative to Printing of Record.

It is hereby stipulated and agreed that in the printing of the record herein for the consideration of the Circuit Court of Appeals that the title of the court and cause in full on all papers shall be omitted,

excepting the first page, inserting in place and stead thereof "Title of Court and Cause."

Dated this 25 day of February, 1910.

WICKERSHAM, HEILIG & RODEN,
Attorneys for Defendant.
CECIL H. CLEGG,
Atty. for Pltff.

[Endorsed]: No. 1084. In the District Court for the Territory of Alaska, Fourth Division. Mrs. C. Barnett, Plaintiff, vs. Dome City Bank, a Corporation, Defendant. Stipulation Relative to Printing of Record. Filed in open court Feb. 25, 1910. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, Clerk. By E. A. Henderson, Deputy.

[Endorsed]: No. 1856. United States Circuit Court of Appeals for the Ninth Circuit. The Dome City Bank (a Corporation), (Defendant), Plaintiff in Error, vs. Mrs. C. Barnett (Plaintiff), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

Filed May 16, 1910.

F. D. MONCKTON,
Clerk.

No. 1856

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE DOME CITY BANK,
(A CORPORATION),
Plaintiff in Error,

vs.

MRS. C. BARNETT,
Defendant in Error.

Brief for Plaintiff in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Fourth Division.

WICKERSHAM, HEILIG & RODEN,
AND F. J. KIERCE,
Attorneys for Plaintiff in Error.

Filed this_____day of November, 1910.
FRANK D. MONCKTON, Clerk.

By_____Deputy Clerk.

A. Carlisle & Co., San Francisco

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE DOME CITY BANK, (A CORPORATION), *Plaintiff in Error,* vs. MRS. C. BARNETT, *Defendant in Error.*	No. 1856.

Brief for Plaintiff in Error.

STATEMENT OF FACTS.

This action was commenced in the District Court of the Territory of Alaska, Third Division, on the 6th day of August, A. D. 1908, to recover from the Plaintiff in Error, Defendant below, the possession of a certain nugget deposited with the Plaintiff in Error by one J. L. Tobin, or in the event that the same could not be obtained, to recover the sum of $1400.00 together with damages in addition in the sum of $500.00.

The Complaint filed in said action is found in the Transcript on pages 2 and 3.

The defendant filed an Answer denying all of the allegations of the complaint which said Answer is found in the Transcript pages 4, 5, 6 and 7.

Under the practice in the Territory of Alaska the plaintiff in said action, the Defendant in Error here-

in, filed a Reply to the averments of the Defendant's answer and thereafter the action was tried before a Jury duly empanelled, testimony was taken in said action, and a verdict rendered in favor of the Defendant in Error herein, against the Plaintiff in Error herein, for the sum of $1250.35. Upon the verdict of the jury a judgment was entered as appears by the Transcript of record pages 10 and 11. Thereafter a motion for a new trial was made and denied as appears by the Transcript pages 11 and 12.

The Plaintiff in Error thereupon took a Bill of Exceptions which embodies all of the testimony introduced in the case by Question and Answer, which Bill of Exceptions is contained from page 13 to page 222 of the Transcript filed upon the Writ of Error herein.

The testimony introduced shows that one J. L. Tobin delivered to and left with the Plaintiff in Error in this action a certain nugget of the approximate value for which the jury rendered a verdict against the Plaintiff in Error herein.

On behalf of the Plaintiff in Error it is contended that after the nugget was so deposited with the Plaintiff in Error, J. L. Tobin transferred the title to said nugget to the Cashier of the Dome City Bank, the Plaintiff in Error herein, and that said cashier applied the value thereof upon the account due from said J. L. Tobin to the said Dome City Bank.

On behalf of the Defendant in Error it is contended that she purchased said nugget from said J. L. Tobin and paid him in one form or another the value of said nugget, although the same was never at any time delivered to her and had been disposed of prior to the commencement of this action.

The position that the Plaintiff in Error takes is that the transfer of the nugget to the cashier and the

subsequent sale thereof by the cashier and the applying of the proceeds upon the account of the bank constitutes a full and sufficient defense to the claims of the Defendant in Error who never had possession of said nugget at any time and to whom the said J. L. Tobin never made any delivery of the same.

After the entry of the judgment by the verdict and the denial of the motion for a new trial by the Plaintiff in Error, the Dome City Bank filed its Petition for a Writ of Error herein and the same was duly allowed by the lower Court, as appears by the Transcript page 229. At the same time the Plaintiff in Error presented its Assignment of Errors which is contained in the record from page 224 to 228 inclusive, and said action was brought up to this Court in regular form.

The following is the Assignment of Errors presented by the Plaintiff in Error as against the judgment rendered against it in the lower Court:

1. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that in order to constitute the plaintiff a *bona fide* purchaser without notice and in good faith she must have actually paid the full price for the nugget in controversy at or before the time of such purchase, and that the acceptance by her of a bill of sale under the evidence in this case to secure the payment of an old debt due her by J. L. Tobin does not constitute her a *bona fide* purchaser for value and without notice."

2. The Court erred in refusing to instruct the jury as requested on behalf of the defendant as follows: "The Court instructs you that the fact that at the time plaintiff claims to have purchased the nugget in controversy she knew that such nugget was not in the

actual possession of J. L. Tobin was such notice to plaintiff as required her to make inquiry as to the condition under which the nugget was actually held at the time by the party actually in possession thereof, and that the law presumes that she had such knowledge at the time she claims to have purchased the nugget as she could have acquired had she made such inquiry from the party actually in the possession thereof."

3. The Court erred in refusing to instruct the jury as requested on behalf of the defendant as follows: "The Court instructs you that the bill of sale to the plaintiff of the nugget in controversy to secure the payment of the debt then owing by J. L. Tobin to the plaintiff does not make the plaintiff a *bona fide* purchaser for value, it being admitted that at the time she claims to have purchased such nugget she paid out no money therefor."

4. The Court erred in refusing to instruct the jury as requested on behalf of the defendant as follows: "The Court instructs you that the fact that at the time plaintiff claims to have received the bill of sale of the nugget from J. L. Tobin, said Tobin did not have the actual possession of the nugget, but had in his possession and exhibited to the plaintiff a receipt dated June 12, 1907, from the Dome City Bank, acknowledging the receipt of the nugget is not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given, but that such receipt is open to explanation."

5. The Court erred in refusing to instruct the jury as requested on behalf of the defendant, as follows: "The Court instructs you that the plaintiff's knowledge, at the time she took the bill of sale that the nug-

get in controversy was not in the actual possession of J. L. Tobin, and her knowledge that said nugget had been delivered to the Dome City Bank on June 12, 1907, imposed upon the plaintiff the duty of inquiring from the said Dome City Bank, at or before she accepted said bill of sale as to the condition upon which they held such nugget at the time the bill of sale was given, and that the law presumes that at the time she accepted such bill of sale she had notice of all such facts as she would have learned had she made such inquiry at or before the time she accepted such bill of sale."

6. The Court erred in instructing the jury as contained in instruction No. 8, in the Court's instructions to the jury which is as follows: "You are further instructed that your verdict should be against the defendant in this case and in favor of the plaintiff, if you find and believe from the preponderance of the evidence that on the 22nd day of July, 1908, the plaintiff purchased the nugget in controversy from the witness Tobin in good faith for a valuable consideration and without any notice that the defendant claimed any right or title to the property in question, and that at the time of said alleged sale the said Tobin was the owner of said property."

7. The Court erred in instructing the jury as contained in instruction No. 8, in the Court's instructions to the jury, which is as follows: "In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant bank, which receipt, as you will observe by reading it, states that the nugget was held by the bank for safekeeping. The receipt is *prima facie* evidence of the truth of its contents; the said receipt, when delivered to the plaintiff, was *prima facie* evidence to the

plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence; and therefore, if you believe from the evidence in this case that the nugget was actually sold to Miss Mulrooney by the witness Tobin before the plaintiff claims to have purchased the same, then your verdict must be for the defendant; and, as before stated, the plaintiff must recover on the strength of her own title and show by a preponderance of the evidence all the material allegations of her complaint, which constitute her right to a recovery in this case; that is, that Tobin was the owner of the nugget at the time the plaintiff claims he sold it to her."

8. The Court erred in rendering and entering a judgment in favor of the plaintiff and against the defendant to the effect: "That the plaintiff Mrs. C. Barnett is the owner and entitled to the immediate and exclusive possession of that certain gold nugget described in the complaint in this action, to-wit, that certain large gold nugget weighing seventy-three and fifty-one one-hundredths ounces, of the value of twelve hundred fifty dollars and thirty-five cents, and that said plaintiff recover of and from the defendant immediate possession of the same, and, if recovery thereof cannot be had, it is hereby ordered, adjudged and decreed that the plaintiff do have and recover of and from the defendant, the Dome City Bank, a Corporation, the value thereof as assessed by the said jury in their said verdict aforesaid, to-wit, the sum of twelve hundred fifty dollars and thirty-five cents, in lawful money of the United States of America, and further that the plaintiff do have and recover of and from the defendant her

costs and disbursements, taxed at the sum of ——— dollars, in this action laid out and expended."

ARGUMENT FOR PLAINTIFF IN ERROR.

The principal question in this appeal is whether the Defendant in Error was a *bona fide* purchaser without notice of the nugget in controversy. The uncontradicted testimony is that the Defendant in Error paid nothing whatever to J. L. Tobin for the nugget in question. The only consideration passing between the parties was the attempted extinguishment of the pre-existing debt. (Transcript of record pages 14-46.)

There is further uncontradicted testimony that the Defendant in Error never received possession of the nugget, knowing full well at the time of her attempted purchase that the nugget was held by the Dome City Bank, Plaintiff in Error herein. The only indicia of ownership held by the said J. L. Tobin was a receipt from the Dome City Bank as follows:

"Dome City, Alaska, June 12, 1907.

"Received from J. L. Tobin one nugget weighing " 73-55-100 ounces ~~Dollars~~ for safe-keeping.

"M. C. MULROONEY, Cashier."

The evidence shows that this receipt was issued at the time the nugget was first deposited in the bank by J. L. Tobin. The evidence further shows that when he withdrew the nugget after its first deposit he failed to surrender the receipt to the Dome City Bank, not having it with him at the time. Plaintiff in Error contends that these facts do not constitute a *bona fide* purchase.

DEFENDANT IN ERROR NOT A *BONA FIDE* PURCHASER.

Plaintiff in Error requested the Court below to instruct the jury that the Defendant in Error was not a *bona fide* purchaser because the only consideration was the pre-existing debt. The refusal of the Court to give this instruction is assigned as error.

A pre-existing debt, as the only consideration for a sale of personal property, is not such a consideration as makes it a *bona fide* purchase. There is an unbroken line of decisions in support of this doctrine. It is true that there are some jurisdictions which support the contrary doctrine, but the weight of authority has firmly supported the doctrine that this is not a valuable consideration. The Supreme Court of Michigan in the case of *Schloss* vs. *Feltus,* 96 Mich. 619; 103 Mich. 525; 36 L. R. A. 161, after considering the matter fully and carefully upon the two appeals taken in this case, decided that such consideration was not sufficient to support the sale so as to make it a *bona fide* purchase. In rendering its decision the Court made use of the following language:

" Upon rehearing, after the fullest consideration, " we find no reason to change the former opinion. " 96 Mich. 619. The principal question in the case " is whether a naked, pre-existing debt is such a con- " sideration or payment for the transfer of a stock " of goods as will defeat replevin by the original " vendor, who sets up fraud in the purchase from " him. The rule, as laid down in 16 Am. & Eng. Enc. " Law, p. 837, is that a pre-existing debt is not such " a consideration as will sustain the plea of '*bona* " *fide* purchaser for value,' except in the case of ne- " gotiable paper. The cases cited will be found to " fully support the text. Other cases will be found

" collected in Tiedeman, Sales, Sec. 329; Hilliard, " Sales, p. 332; and Benjamin, Sales, 6th ed. p. 448. " Mr. Tiedeman says: 'Although there are a few " cases which maintain that a pre-existing debt is a " sufficient consideration, . . . the better opin- " ion is that it is not sufficient, because there is no " parting with value in reliance upon the title to the " goods thus acquired, and that an attaching or other " creditor is not a *bona fide* purchaser.' Some of the " cases would seem to make a distinction between a " receipt of property in payment of a pre-existing " indebtedness, and a receipt in satisfaction or dis- " charge of such a debt; that a satisfaction can only " result from an agreement to that effect, but pay- " ment operates as a discharge or satisfaction of the " debt, and in either case the failure of title revives " the debt."

The Supreme Court of the State of California has also adhered to this doctrine, and in simple and terse language, seemingly admitting of no contradiction or argument, has announced that such consideration does not support the sale:

" The defendant in this case, holds a claim which " accrued before the sale; and as he paid nothing on " his purchase at the execution sale, he cannot claim " the right of a *bona fide* purchaser in such cases. " If the amount of his bid on the property was ap- " plied as a credit on the execution and judgment, he " can have the same canceled at any time by apply- " ing to the Court and showing that he obtained no " title to the property by his purchase. (Prac. Act, " Sec. 237; *Piper* v. *Elwood,* 4 Denio, 165; *Adams* v. " *Smith,* 5 Cowen, 280; *Nelson* v. *Rockwell,* 14 Ill. " 375.) By that means, he will be placed in the same

" position he was in before his purchase, and will " have lost nothing thereby."

Sargent et al v. *Sturm*, 23 Cal. 359-362;
Baze v. *Arper*, 6 Minn. 220;
Harmon v. *Short*, 16 Miss. 433;
Sleeper v. *Davis*, 64 N. H. 59;
Mingus v. *Condet*, 23 N. J. Eq. 313;
Barnard v. *Campbell*, 58 N. Y. 73;
Starr Bros. v. *Stevenson*, 91 Iowa 684.

One who purchases personalty without parting with anything of value, or who does not put himself in a worse position, surely cannot be said to have made a *bona fide* purchase. Defendant in Error in this case did not change her position in regard to J. L. Tobin. She still has an action against him for the amount due her from him.

It is manifest that serious error prejudicial to the rights of Plaintiff in Error has been made by the refusal of the Court below to grant the instruction requested.

DEFENDANT IN ERROR HAD NOTICE SUFFICIENT TO PUT HER UPON INQUIRY.

But the lack of a valuable consideration to support the sale in this controversy is not the only difficulty encountered. Defendant in Error never received the nugget in question, but received from J. L. Tobin merely a receipt issued to him by the Dome City Bank. This receipt was sufficient to put the defendant in error upon her inquiry as to the existence of any adverse claims which the bank might hold. The uncontradicted testimony is that the Defendant in Error made no inquiries whatsoever of the bank as to the existence of any claims against the said nugget. (Transcript pages 14-46.) In this she was guilty of

negligence, and the law will presume that she had full knowledge of all the facts which she might have learned had she made due and diligent inquiry. She cannot now be heard to say that having failed to make such inquiry she did not know of the existence of any adverse claims. There is no rule of law better established and more thoroughly understood than that of notice. The rule is, that one who purchases personal property must exercise such diligence and caution as would be exercised by an ordinary person. The Supreme Court of Minnesota in *Cochran* vs. *Stewart,* 21 Minn. 435, briefly lays down the rule in the following language:

"A purchaser of personal property is bound to "exercise that degree of caution and diligence, in "ascertaining the title of the vendor or assignor, "which ordinarily prudent business men usually ex- "ercise in like circumstances, and is charged with "constructive notice of such facts only as the use of "such caution and diligence would probably have "discovered."

We quote further from a Texas case which is but a re-statement of the former rule:

"What will suffice to charge a purchaser with no- "tice of his vendor's want of title must depend on "the peculiar circumstances of each case. No com- "plete rule and body of exceptions can be pre- "scribed. It was error to refuse to instruct the jury "that 'such circumstances, coming to the purchaser's "knowledge before the completion of the purchase, "as would put a reasonably prudent man on the in- "quiry, constitute notice.'"

Hines v. *Perry,* 25 Tex. 443.

The same rule obtains in the Federal Courts as is evidenced by the following citation:

"Where a party purchases an interest in a vessel "merely on the representation of the seller that he "was the owner of such interest, and knowing at the "time that such seller was not in possession nor ex- "ercising acts of ownership over the vessel, and neg- "lected to ascertain from known part owners of the "vessel whether the seller's claim as part owner was "*bona fide*, he is not an innocent purchaser without "notice, nor can he claim that he exercised even or- "dinary diligence in the matter of said purchase."

The Nancy Dell, 14 Fed. 744.

The rule has been extended to a marked degree in Pennsylvania where it is held that "A purchaser, "who takes an assignment of a bill of lading from "one who appears on the face of it to be an agent, "cannot claim to be a *bona fide* holder without no- "tice; for that fact is enough to put him on inquiry "as to the true state of the title."

Decan vs. *Shipper*, 35 Pa. 239; 78 Am. Dec. 334.

The same rule holds in the New York jurisdiction as is evidenced by the following:

"Plaintiff, having advanced on certain drafts "drawn against a shipment of wheat, took the bills "of lading as collateral security. The drafts having "been protested, the shipper of the wheat gave an "order upon the warehousemen after its discharge "from the vessel to parties who knew of the protest "of the drafts, and they obtained and sold a large "portion of the wheat. *Held*, that the purchasers "of the portion sold, knowing that it had been dis- "charged from vessels, were bound to make inquiry

" for the bills of lading, and having failed to do so, " were deprived by their neglect of the character of " *bona fide* purchasers."

City Bank v. *Rome, W. & O. R. Co.,* 44 N. Y. 136.

One of the most recent cases of all is that of *Reynolds* vs. *Fitzpatrick,* a Montana case found in 107 Pac. Rep. page 902. We quote from the opinion of Judge Holloway:

" It thus appears that, before Collins purchased " from Hall, he had some knowledge that Reynolds " claimed an interest in the property by virtue of a " chattel mortgage; and we think it was for the jury " to say whether, from the information he received, " Collins was apprised of the claim asserted by " Reynolds, or received such notice as would lead an " honest man exercising ordinary prudence, to make " further inquiry. The rules governing a case of " this character are stated in 2 Cobbey on Chattel " Mortgages, Section 608, as follows: 'When a pur- " chaser has knowledge, of any fact sufficient to put " him on inquiry as to the existence of some right or " title, in conflict with that he is about to purchase, " he is presumed to have made the inquiry, and as- " certained the extent of such prior right, or to have " been guilty of a degree of negligence equally fatal " to his claim to be considered as a *bona fide* pur- " chaser. . . . Notice to a purchaser of property " of the existence of liens or incumbrances thereon " is sufficient, in the absence of explanation, to " charge him with notice of any and all liens or in- " cumbrances which an inquiry would have disclosed. " It is not necessary, in such a case, to show actual " notice of the particular instrument creating a lien, " to deprive him of the character of a *bona fide* pur-

" chaser. *Reed* v. *Gannon,* 50 N. Y. 345."

Plaintiff in Error requested the Court below to instruct the jury that the fact that the nugget was not in possession of J. L. Tobin at the time of the sale was such notice to the plaintiff as required her to make inquiry as to the condition under which the nugget was held by the party in possession and that upon her failure to follow up this inquiry, the law presumes that she had such knowledge at the time of the attempted sale as she could have acquired had she made such inquiry. (Transcript page 179.) The Court refused the instruction, and Plaintiff in Error assigned this as error. In view of the cases cited above the gross error of this refusal must be apparent to any one.

RECEIPT IS NOT CONCLUSIVE EVIDENCE OF OWNERSHIP.

Plaintiff in Error requested the Court to instruct the jury that the receipt from the Dome City Bank to J. L. Tobin (Plaintiff's Exhibit No. 2, Transcript page 195), was not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given to Defendant in Error, but that such receipt was open to explanation. (Transcript page 180.) The Court refused to grant this instruction and Plaintiff in Error has included this in its assignment of errors. All writers on "Evidence," all the text books and cases thus far examined, without any exception, lay down the rule that such a receipt is open to explanation and at the best is but *prima facie* evidence.

" A 'receipt' is not a contract, but merely evidence " of the performance of a contract, and is always " open to explanation; and an instrument reading: " 'Sold to O. B. one chestnut colt for $145. Received

" payment by note on three months, payable at Hop-
" kinton Bank. (Signed) H.'—was held, so far as
" the receipt part thereof was concerned, to be open
" to the explanation that the sale was conditional,
" with an express stipulation that the horse was not
" to become the defendant's property until he should
" deliver in payment a promissory note which would
" be discounted at such bank without plaintiff's in-
" dorsement."

Hildreth v. *O'Brien,* 92 Mass. (10 Allen) 104.

" Receipts, whether for money paid or for other
" matter or thing, are regarded as informal, non-
" dispositive writings, open to explanation, modifi-
" cation, or contradiction by parol evidence.

Gravlee v. *Lamkin,* 24 South. 756, 759; 120 Ala. 210.

These cases and many more support the requested instruction of Plaintiff in Error.

The cases herein cited show that the Court made an error when it refused the instructions requested by Plaintiff in Error and thus the case went to a jury who were not instructed as to the law affecting rights of the respective parties thereto, and therefore, in the case at bar the title of Defendant in Error must fail by reason of the matters hereinbefore set out and the sale to Margaret Mulrooney of the nugget in controversy must then be affirmed, and, therefore, the judgment against the Dome City Bank, Plaintiff in Error, must be set aside.

For the reasons, therefore, hereinbefore set forth, we respectfully but earnestly urge that the judgment ought to be reversed with instructions to the Court below to proceed in accordance therewith.

WICKERSHAM, HEILIG & RODEN AND F. J. KIERCE,
Attorneys for Plaintiff in Error.

No. 1856

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE DOME CITY BANK, a Corporation,
Plaintiff in Error,

vs.

MRS. C. BARNETT,
Defendant in Error.

Brief on Behalf of the Defendant in Error.

CECIL H. CLEGG,
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1122-1124 MISSION ST.

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vs.
MRS. C. BARNETT,
Defendant in Error.
No. 1856.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This was an action of replevin instituted and prosecuted by the defendant in error against the plaintiff in error in the District Court of the Third Division of the District of Alaska.

It is alleged in the complaint (after alleging the corporate capacity of the defendant) that on June 12, 1907, one J. L. Tobin, specially deposited with the Dome City Bank for safe keeping, at its banking office in the town of Dome City, a large gold nugget, belonging to

said Tobin, of the weight of 73.35 ounces, and of the value of $1400.00; which nugget the bank then and there accepted and received from the said Tobin, as bailee thereof for the purpose aforesaid, and then and there promised and agreed to deliver up and return upon demand; and that thereafter on July 22, 1908, the said Tobin, for a valuable consideration, sold, assigned and transferred to the plaintiff in said action (the defendant in error herein) the said gold nugget, and that the said plaintiff (defendant in error) is and ever since has been the owner and entitled to the immediate and exclusive possession of the said nugget, and that subsequent to the said sale and prior to the commencement of said action the plaintiff demanded of defendant the return of said nugget and delivery of possession thereof to plaintiff, but that the defendant refused to surrender up and deliver up the same to plaintiff, and still continues to so refuse, and wrongfully and unlawfully withholds the same from plaintiff to her damage in the sum of $500.00; wherefore the plaintiff prayed judgment as usual in such cases (Tr., pp. 2-3).

The defendant (plaintiff in error) in and by its answer admitted that it was a corporation as alleged in the complaint, and that Tobin on or about June 12, 1907, deposited with it, without hire, for safe keeping, the gold nugget referred to in plaintiff's complaint, but denied that the same was of any greater value than $1283.16; and denied the sale of the nugget by Tobin

to Mrs. Barnett; and denied that she was or is the owner or entitled to possession thereof. The bank also by its said answer admitted plaintiff's demand for the possession of said nugget, but denied generally "each and every other allegation contained in paragraph number 4 in said complaint;" and thereby denied, as it would seem, that it refused to surrender and deliver the same to plaintiff, and that it still continues to so refuse, and that it wrongfully and unlawfully withholds the same from plaintiff, to plaintiff's damage in the sum of $500.00.

In addition to these denials, the answer states, or purports to state, two further and separate defenses to the cause of action alleged in said complaint, as follows, to-wit:

"I.

"That on or about the 12th day of June, 1907, one J. L. Tobin deposited with this defendant and defendant received from the said Tobin, without hire, for safe keeping, that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 and no more; that about thirty days thereafter the said Tobin came and requested the defendant to return the said nugget to him, and the defendant then and there delivered the said nugget to the said Tobin, who received and carried the same away from the possession of defendant.

"And for a second further and separate defense to the cause of action alleged in said complaint, defendant says:

"I.

"That on or about the 12th day of June, 1907, one J. L. Tobin deposited with this defendant and defendant received from the said Tobin, without hire, for safe keeping, that gold nugget mentioned in paragraph two of the complaint; that said nugget was and is of the value of $1283.16 and no more; that about thirty days thereafter the said Tobin came and requested defendant to return the said nugget to him, and the defendant then and there delivered the said nugget to the said Tobin, who received and carried the same away from the possession of defendant.

"II.

"That thereafter and about the last day of October, 1907, the said Tobin returned the said nugget and again deposited it with defendant, and being then and there desirous of obtaining advances of money on his check in excess of his deposit, he then and there pledged the said nugget to the defendant bank upon an agreement with the bank that the said Tobin might draw money from the said bank in the amount of the value of said nugget; and long prior to the date of the alleged sale of the said nugget to the plaintiff the said Tobin drew against the value of the said nugget and this defendant paid him the full value thereof; that thereafter and about the

month of July, 1908, the said Tobin duly sold and assigned the said nugget to Margaret Mulrooney, and this defendant gave said Tobin in consideration thereof due credit on the debt which he then owed to defendant bank in the sum of the full value of the said nugget, to wit, the sum of $1283.16."

The defendant in error, in and by her reply, denied each and all of these allegations, save and except the allegation in paragraph number one of said "second further and separate defense" to the effect that on or about June 12, 1907, J. L. Tobin deposited with defendant, and defendant received from said Tobin, for safe keeping, without hire, the gold nugget mentioned and described in plaintiff's complaint (Tr., p. 8).

It will be noted that it was not alleged by the bank that it held the nugget as a pledge at the time of the sale of the same by Tobin to Mrs. Barnett, nor that Tobin was at that time indebted to the bank in any amount whatever. The alleged sale to Miss Mulrooney was its sole defense, and in point of fact the only issue really in controversy and litigated and decided upon the trial. It is true there was and is a substantial conflict in the evidence in respect of the allegation that Tobin was indebted to the bank *at the time of the alleged sale to Miss Mulrooney,* and in respect to the allegation that he had, prior thereto, and in consideration of such indebtedness, pledged the nugget to the bank, or that the bank held the same in any manner as security for the payment of said or any indebted-

ness; but this conflict was with reference to the matters of evidence, whereby the bank sought to prove or establish the fact of the sale to Miss Mulrooney.

The fact of the sale by Tobin to Mrs. Barnett, while it is, as a matter of formality, denied in the answer, was not in point of fact denied by the bank at the trial. It appears, on the contrary, that the sale of this well-known nugget (the largest in the Tanana, as appears by the Transcript, p. 87) to Mrs. Barnett, was a matter of unquestioned verity and general notoriety. It was evidenced by a written bill of sale, which was recorded on July 24, 1908, in Volume 1 of Bills of Sale, at page 119, in the Fairbanks Recording District (Tr., p. 195), and the fact of the sale was published in "the paper" (Tr., p. 17); and neither was there in point of fact any denial of or controversy in respect of the fact that Tobin was, at the time of the sale to Mrs. Barnett, actually indebted to her for her work and labor and for moneys loaned by her to him in an amount equal approximately to the full value of the nugget, and that the sale to her was made in payment of this indebtedness (Tr., pp. 14, 16, 26, 27, 41).

ARGUMENT.

The learned counsel for the plaintiff in error say in the opening sentence of their argument (Brief, p. 7) that "the principal question in this appeal is whether the defendant in error was a bona fide purchaser without notice of the nugget in controversy." But in this

we respectfully submit that counsel are manifestly mistaken. The principal, and in fact the only ultimate question in this case, was and is whether or not J. L. Tobin was the owner and entitled to sell the nugget in question at the time he did sell it to Mrs. Barnett—and as to that question (as well as to all other questions of fact in issue) the plaintiff in error is finally concluded by the verdict of the jury.

Lehnen vs. *Dickson,* 148 U. S., 71; 13 Sup. Ct., 481; 37 L. Ed., 373;
Schmid vs. *Dohan,* 167 Fed., 804;
Erkel vs. *United States,* 169 Fed., 623.

Furthermore, it appears upon reference to the transcript (pp. 47, 49, 60, 127) that the theory upon which this case was tried by the Court and by the parties litigant in the District Court was, that the question of ownership at the time of the sale to Mrs. Barnett was the sole issue in the case. Thus, on page 47 of the transcript, the defendant (plaintiff in error) objected to the question asked of the witness Tobin and moved to strike his answer as a conclusion, upon the ground that "The question of ownership is the sole issue in this case."

This was not and is not a case in which the right and title of the plaintiff rests or depends upon the proof or assertion of her good faith or want of notice. The basis of her right and title is that Tobin was the owner and entitled to sell the nugget at the time when he did

sell it to her. The cases in which the questions of good faith, and notice or want of notice, and consideration or want of consideration, arise and exist are cases in which the plaintiff, in effect, admits that the person from whom he bought the land, or the goods, was not in point of law or fact the owner or entitled to sell the same; but insists that under the law and in view of the circumstances he is nevertheless entitled to hold and retain the same simply and only by reason of the fact that he did purchase same in good faith and for an adequate and valuable consideration, and in the due and regular course of business and without notice of the vendor's want or defect of title or right to sell.

Such are the cases in which a subsequent purchaser of lands may possibly prevail over the rightful owner under a prior unrecorded deed, or the purchaser of negotiable paper, or of goods fraudulently obtained, may hold the same as against the rightful owner. And all the cases cited or that can be cited by the learned counsel will be found to be of this description, and manifestly of no application in a case where, as in this, the plaintiff claims nothing by reason of the nature of the consideration he has given, or his want of notice of his adversary's claim; but claims wholly upon the absolute and entire validity of his vendor's title and right to make the conveyance upon which he relies.

It might be profitable from a purely academic point of view to enter upon a thorough and exhaustive examination and discussion of some of the interesting

and important (if true) propositions of law announced and relied upon by the plaintiff in error. Thus, on page 8 of its brief, after reciting that "Plaintiff in error requested the Court below to instruct the jury that the defendant in error was not a *bona fide* purchaser because the only consideration was the pre-existing debt," it is announced that:

> "A pre-existing debt, as the only consideration for a sale of personal property, is not such a consideration as makes it a *bona fide* purchase."

And in support of this doctrine the following cases are cited, namely:

> *Schloss* vs. *Feltus,* 96 Mich., 619; 103 Mich., 525; 36 L. R. A., 161;
> *Sargent et al.* vs. *Sturm,* 23 Cal., 359-363;
> *Baze* vs. *Arper,* 6 Minn., 220;
> *Harmon* vs. *Short,* 16 Miss., 433;
> *Sleeper* vs. *Davis,* 64 N. H., 59;
> *Mingus* vs. *Condet,* 23 N. J. Eq., 313;
> *Barnard* vs. *Campbell,* 58 N. Y., 73;
> *Starr Bros.* vs. *Stevenson,* 91 Iowa, 684.

It would seem to be sufficient, without going into details, to point out in general terms the nature of these cases, from which it is apparent that they were and are, each and all, cases of the kind we have mentioned—that is to say, cases in which the party claiming by purchase admits the claim of the other party, but insists

upon his right nevertheless, as an innocent purchaser, to hold and retain the lands or the goods in question. The nature of these cases, relied upon by plaintiff in error, is as follows:

Schloss vs. *Feltus* was an action of replevin to recover merchandise from one claiming as purchaser from an alleged fraudulent vendee.

Sargent vs. *Sturm* was a similar case, in which, however, the defendant purchased at an execution sale upon his own judgment against the alleged fraudulent vendee.

Baze vs. *Arper* was ejectment, in which Baze alleged that the title to the land in question was acquired by Arper with notice of the fact that it had been conveyed by one Fish in fraud of the rights of Baze's predecessor in interest who was a creditor of Fish, in violation of the law which makes such a transfer void, or at any rate voidable.

Harmon vs. *Short* was a controversy between the holder of a prior unrecorded mortgage of a slave and a subsequent purchaser (for a pre-existing debt) of the same slave from the mortgagor thereof. The mortgagee sued in detinue and recovered the slave.

Sleeper vs. *Davis* was the case of a purchaser of goods from one who obtained possession of them by fraudulent purchase.

Mingus vs. *Condet* was the case of a purchaser of lands from a grantee whose deed was void as against

his creditors "by the statute of frauds" (as it is expressed in the syllabus).

Barnard vs. *Campbell* was the case of 1370 bags of linseed obtained by fraudulent purchase, and the Court said the sale was defeasible by the vendor who could be divested of his rights only by a sale to an innocent purchaser, etc.

And *Starr Bros.* vs. *Stevenson* was another case of a buyer of goods from a fraudulent vendee.

Cases of this sort, as we respectfully submit, have no application in a case where, as in this, the only issue was as to whether or not there was any sale whatever except the one to the plaintiff, and upon which she relies.

If the Court, however, by reason of the academic interest, which may be supposed to exist, should see fit to pursue the subject any further, it may be suggested that there is a very valuable and interesting collection and review of the cases upon this precise question to be found in the extended note to *Schloss* vs. *Feltus,* in 36 L. R. A., pages 161-173, under the head of "Pre-existing Debt as consideration for *bona fide* purchase of property not negotiable." It goes without saying that this note was written subsequent to the decision in the case to which it is appended; and it will be noted that the writer thereof, with a large number (if not all) of the cases before him, has refrained from indicating any opinion as to the preponderance of authority. He shows, however, that in ten States and forty-one cases the purchaser

is held to be a *bona fide* purchaser for value, if he does not participate in the fraud of his debtor; while in six States and twenty cases he is held not to be a *bona fide* purchaser for value. "In the Federal Courts (as he says, p. 173) the preferred creditor is held to be a *bona fide* purchaser for value although one case does so on the ground of a surrender of securities." (Citing *Magniac* vs. *Thompson,* Baldw., 344; affirmed 32 U. S.; 7 Pet., 348; 8 L. Ed., 709; and *Dunlap* vs. *Green,* 60 Fed., 242.) And in conclusion he says: "It is seen from " a review of all the decisions that it is impossible to " reconcile them, and that there are numerous authori- " ties on each side of the question; so that the division " of opinion between the judges on *Schloss* vs. *Feltus* " only continues the long line of opinions on each side."

It may be suggested in this connection that if it were necessary or proper to go into this question with thoroughness it might be found that very frequently the rule is found or made to change with the nature of the case. Thus, in California, it was held in the case of *Sargent* vs. *Strum,* 23 Cal., 359, cited and relied upon by the plaintiff in error, that a pre-existing debt is not a valuable or sufficient consideration for the purchase of goods as against a person from whom the vendor fraudulently obtained them; while it is held by the same Court that in cases arising under sections 1107 and 1214 of the Civil Code (which merely state the law as the codifiers found it) a conveyance in consideration of a pre-existing debt

is a conveyance for a valuable consideration as against a prior unrecorded deed.

Frey vs. *Clifford,* 44 Cal., 335;
Schluter vs. *Harvey,* 65 Cal., 158;
Gassen vs. *Hendrick,* 74 Cal., 444;
Foorman vs. *Wallace,* 75 Cal., 554;
Riley vs. *Martinelli,* 97 Cal., 582.

It is respectfully submitted, however, that there is no ground upon which we could be justified in treating this question as though it were or could be properly involved in the decision of this case. And so, also, we say with respect to all that portion of the argument of the plaintiff in error that comes under the head of *"Defendant in error had notice sufficient to put her upon inquiry,"* and which is to be found on pages 10-14 of its brief. The defendant in error, if it were the fact, might safely admit, not only that she had notice sufficient to put her upon inquiry, but that she actually made the inquiry and ascertained all of the facts that went to the jury, in this case, and that she thereupon came to the same conclusions that the jury came to, that is to say, that Tobin did not pledge the nugget to the bank and did not sell it to Miss Mulrooney; and that he was the owner of it and had a perfect right to convey it to her in payment of the debt he owed her. It has never been held by any Court, so far as we know, that a creditor is under obligation to refuse payment of a just debt simply because some one else may make an

unfounded claim of title to or lien upon the property which is offered in payment thereof. The creditor in all such cases takes property, other than money, in payment of his debt, subject to all just claims, legally enforceable against it; and it would seem unreasonable to hold or contend that because the creditor had notice or knowledge of an outstanding claim which he deemed unfounded, he might not nevertheless take the property first and litigate the justness or unjustness or the validity or invalidity of that claim afterwards.

The only other point relied upon by the plaintiff in error is that plaintiff in error requested the Court to instruct the jury that the receipt from the Dome City Bank to J. L. Tobin (Plaintiff's Exhibit No. 2, Transcript, page 195) was not conclusive evidence that the said Tobin was the owner of such nugget on July 22, 1908, when the bill of sale was given to defendant in error, but that such receipt was open to explanation (Tr., p. 180); (and that) the Court refused to grant this instruction.

In reply to this, it may be said, first, that it is matter of common knowledge among all men of ordinary intelligence that a receipt is not conclusive evidence of the matters shown thereby or recited therein, but that the same are open to explanation; and that error could hardly be predicated of the refusal to give such an instruction, even if the Court had in fact refused or neglected to give it either in form or substance as requested; especially in view of the fact that the rule of law thereby

announced is a rule of evidence merely, and that the plaintiff in error was, at the trial, accorded all the opportunity it desired to explain and contradict the receipt in question, and did, in point of fact, so explain and contradict it. And, second, that the Court did in fact and in substance charge and instruct the jury upon this point as requested by the plaintiff in error, as will more fully appear by reference to the Court's instruction No. XII (Tr., p. 188), wherein the learned judge presiding instructed the jury that:

> "In this case the plaintiff has offered in evidence a bill of sale, together with a receipt issued by the defendant bank, which receipt, as you will observe by reading it, states that the nugget was held by the bank for safe keeping. The receipt is *prima facie* evidence of the truth of its contents; and said receipt, when delivered to the plaintiff, was *prima facie* evidence to the plaintiff that the bank held the nugget in question in that capacity. But it is not conclusive evidence of that fact. The receipt, or the facts therein stated, may be rebutted by other evidence."

It is respectfully submitted that the prosecution of this writ of error is without merit, and that the judgment of the District Court should be in all respects affirmed.

Respectfully submitted.

CECIL H. CLEGG,
Attorney for Defendant in Error.

METSON, DREW & MACKENZIE,
Of Counsel.

No. 1858

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

HELEN A. McCLURE, CHARLES W. McCLURE and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, JETHRO G. MITCHELL and LEROY BROOKS (Defendants),

Appellants,

vs.

THE UNITED STATES OF AMERICA (Plaintiff),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the District of Oregon.

No. 1858

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FOR THE NINTH CIRCUIT.

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TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, and JETHRO G. MITCHELL, and LEROY BROOKS,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Names and Addresses of Attorneys of Record.

HARRISON G. PLATT and ROBERT T. PLATT, Board of Trade Building, Portland, Oregon, for Appellants.

JOHN McCOURT, United States Attorney, District of Oregon, Portland, Oregon, for Appellee.

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY—No. 3409.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon,

Defendants.

Citation to Appellee [Original].

United States of America,—ss.

To the United States of America, Greeting:

Whereas, Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks have lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, from a decree lately rendered in favor of you, the said United States of America, and have filed a bond, with the security re-

quired by law, and the same has been duly approved,—

You are, therefore, hereby cited to appear before said United States Circuit Court of Appeals for the Ninth Judicial Circuit, at the City of San Francisco, in said Circuit, on the 1st day of June, 1910, to do and receive what may pertain to justice to be done in the premises.

Given under my hand and seal in the City of Portland, in the Ninth Circuit, this 3d day of May, 1910.

R. S. BEAN,

Judge of the District Court of United States for District of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within Citation, by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 3 day of May, 1910.

JOHN McCOURT,
United States Attorney,
Of Attorneys for Plaintiff.

[Endorsed]: No. 3409. In the Circuit Court of the United States, for the District of Oregon. United States of America, Plaintiff, vs. Helen A. McClure et al., Defendants. Citation to Appellee. Filed May 3, 1910. G. H. Marsh, Clerk. By ————, Deputy.

In the Circuit Court of the United States, for the District of Oregon.

October Term, 1908.

BE IT REMEMBERED, that on the 24th day of December, 1908, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

In the Circuit Court of the United States, for the District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, and JETHRO G. MITCHELL and LEROY BROOKS, ROBERT B. MONTAGUE and HORACE G. McKINLEY,

Defendants.

To the Honorable Judges of the Circuit Court of the United States, Sitting in Equity:

The United States of America, by John McCourt, United States Attorney for the District of Oregon, pursuant to authority conferred upon him by the Attorney General of the United States, brings this

its bill of complaint against the defendants above named, and complaining of said defendants shows unto your Honors:

I.

That at all the dates and times between the 1st day of July, 1900, and the 1st day of July, 1904, one W. F. Hammer was duly elected, qualified and acting County Clerk of Linn County in the State of Oregon and at all said times one Robert B. Montague was deputy clerk of said Linn County, State of Oregon. That among the duties and authorities imposed upon and reposed in the said W. F. Hammer as such county clerk was the taking of applications and proof upon homestead entries under the laws of the United States; and the said W. F. Hammer at all said times and dates authorized his said deputy, Robert B. Montague, to take such homestead applications and proofs and administer the requisite oaths thereon in his name and stead, and authorized the said Robert B. Montague to affix the official seal and signature of the said W. F. Hammer as such county clerk to said homestead applications and proofs.

II.

That on or about the 28th day of September, 1893, the President of the United States duly and regularly reserved, set aside and established what is known as the Cascade Forest Reserve in the State of Oregon, which said Forest Reserve among a large quantity of other lands of the United States embraced and included and does embrace and include the hereinafter described lands.

III.

That at all the dates and times hereinafter mentioned the United States of America was and is now the owner of the southeast quarter of section five (5), township eleven (11) south of range seven (7) east of Willamette Meridian, containing one hundred sixty (160) acres. That said lands were prior to the 28th day of September, 1893, unappropriated public lands of the United States, and thereafter and ever since said time and are now reserved and set aside as a part of said Cascade Forest Reserve under and by virtue of the reservation made thereof by the President of the United States as aforesaid.

IV.

That on and prior to the 20th day of October, 1900, one Horace G. McKinley, the said Robert B. Montague and other persons to complainant unknown, taking advantage of the pretended authority conferred upon the said Robert B. Montague as such deputy clerk of Linn County, Oregon, and with intent to defraud the United States out of the title and possession to the lands hereinbefore described, and in order that they might secure to themselves the use and benefit of said land as a basis for a lieu selection under the Act of June 4, 1897 (30 Stats. L., page 36), falsely and fraudulently forged an application and affidavit to enter said lands under the homestead laws in the name of John Reese, a fictitious person; and the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, to said affidavit of homestead entry, and subscribed the name of W. F. Ham-

mer, County Clerk, thereto, and thereupon said Horace G. McKinley and the said Robert B. Montague caused said application and affidavit of homestead entry to be filed in the United States Land Office at Oregon City, Oregon, on the said 20th day of October, 1900.

V.

That in and by said false and fraudulent and fictitious application to enter said lands as aforesaid, the said Horace G. McKinley, Robert B. Montague and other persons to complainant unknown falsely and fraudulently made it to appear that the said John Reese resided at Sisters, Oregon, and that he applied to enter said lands under Section 2289, R. S. of the United States; and in and by said false, fraudulent fictitious homestead affidavit the said Horace G. McKinley, Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear that John Reese of Sisters, Oregon, did solemnly swear that he was not the proprietor of more than one hundred sixty (160) acres of land in any State or Territory; that he was a native-born citizen of the United States, over the age of twenty-one, and that his application to enter said lands was made honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation and that he would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for, and that he was not acting as agent of

any person, corporation or syndicate in making such entry nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon. That he did not apply to enter the same for the purpose of speculation but in good faith to obtain a home for himself, and that he had not directly or indirectly made and would not make any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and further that since August 30, 1890, he had not entered under the land laws of the United States or filed upon a quantity of land agricultural in character, not mineral, which with the tracts then applied for would make more than three hundred twenty (320) acres and that he had not theretofore made any entry under the homestead laws.

VI.

That at the time the said Horace G. McKinley and Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made, subscribed and caused to be filed the hereinbefore application and affidavit of homestead entry in the name of the said John Reese, a fictitious person, they also falsely and fraudulently caused to be executed an affidavit under the provisions of Section 2294 of the Revised Statutes of the United States, and falsely and fraudulently forged the name of John Reese thereto as a claimant for homestead

entry and as the affiant in said affidavit and caused the same to be filed in the United States Land Office at Oregon City, Oregon, together with the application and affidavit hereinbefore mentioned; that in and by said last mentioned affidavit the said Horace G. McKinley, Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear that the said John Reese, a fictitious person, was a qualified entryman under the homestead laws of the United States, and that the said false and fraudulent application of homestead entry of the said John Reese, was made for the purpose of actual settlement and cultivation and for the exclusive use and benefit of the said John Reese, and not directly or indirectly for the benefit of any person or persons whomsoever, and that the said John Reese was then residing on said lands, and that he had made a bona fide improvement and settlement thereon and that said settlement was commenced June 16, 1892, and that his improvements consisted of a house, fruit trees, small fruits, clearing, and that the value of the same was Three Hundred Fifty ($350.00) Dollars, and that owing to distance and expense the said John Reese was unable to appear at the district Land Office to make said affidavit, and that the said John Reese had never before made a homestead entry. To the last mentioned affidavit, the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, and subscribed the name of W. F. Hammer, County Clerk of said county thereto.

VII.

That upon the receipt of said homestead application and affidavits aforesaid, Charles B. Moores, Register of the United States Land Office at Oregon, City, Oregon, gave to said application the No. 13,169, and attached to said application his official certificate to the effect that said application was made for surveyed lands of the class which the applicant was legally entitled to enter under Section 2289 of the Revised Statutes of the United States and that there was no prior, valid, adverse right to the same.

VIII.

That in truth and in fact no such person as John Reese ever existed and where the name of John Reese appears upon said application and affidavits of homestead entry the same was forged by the said Horace G. McKinley, Robert B. Montague, or other persons acting with them, to your complainant unknown; that no person ever settled upon, resided upon, or made improvements upon said southeast quarter of section five (5) in township eleven (11) south, range seven (7) east, Willamette Meridian, prior to the 28th day of September, 1893, or at any other time, or at all; that no improvements of any character were ever placed upon said lands at any time by any person and there are no improvements thereon now, and there never were any improvements thereon; and said false, fraudulent, forged, fictitious and pretended homestead entry of said lands in the name of the said John Reese, was made for the purpose of falsely and fraudulently representing to the officers of the land department of the

United States that a homestead right had attached to said lands prior to the setting aside and establishment of said Cascade Forest Reserve, as hereinbefore set forth, and in order that the said Horace G. McKinley, Robert B. Montague and other persons acting with them to your complainant unknown, might thereby falsely and fraudulently acquire the title to said lands and secure the benefits therefrom as a basis for a lieu selection under the laws of the United States.

IX.

That on or about October 23, 1900, the said Horace G. McKinley, Robert B. Montague, or some person or persons acting with them to your complainant unknown paid to the Receiver of the United States Land Office at Oregon City, Oregon, the sum of Sixteen ($16.00) Dollars, the amount of fee and compensation of the Register and Receiver of said Land Office, upon filing said application and affidavits of homestead entry covering the said southeast quarter of section five (5), township eleven (11) south, range seven (7) east, Willamette Meridian, and thereupon William Galloway, Receiver of said United States Land Office issued a Receiver's receipt for said sum in the name of said John Reese, and thereafter on November 1, 1900, the said Horace G. McKinley and Robert B. Montague, caused to be filed with the Register and Receiver of the United States Land Office at Oregon City, Oregon, a notice in the name of John Reese and to which said last mentioned persons forged the name of the said John Reese, which said notice was to the effect that the

said John Reese intended to make final proof to establish his claim to the lands embraced in said false and fraudulent homestead entry, and that he expected to prove his residence and cultivation before W. F. Hammer, County Clerk of Linn County, Oregon, at Albany, Oregon, on December 24, 1900, by two of the following witnesses: Edward Reese, James A. Taylor, Willis Burns, and John F. Foster, all of Sisters, Oregon; that the names of the alleged witnesses above mentioned were all false and fictitious names, adopted by the said Horace G. McKinley and Robert B. Montague for the purpose of defrauding the United States out of its said lands, there being no such persons existing.

X.

Thereafter upon the 5th day of November, 1900, Charles B. Moores, Register of the Land Office of the United States, at Oregon City, Oregon, being ignorant of the foregoing facts and having no means of ascertaining the same, issued a notice in compliance with the pretended application to make final proof of the said John Reese, and directed that the same be published in the "Criterion," a paper published at Lebanon, Oregon, and thereafter the said Horace G. McKinley, Robert B. Montague and other persons acting with them and unknown to complainant, caused notice of said final proof of the said John Reese to be published in the "Lebanon Criterion" as required by law for six consecutive weeks.

XI.

That thereafter on the 24th day of December, 1900, pursuant to said scheme to defraud the United

States out of the title and possession to its said lands, the said Horace G. McKinley, Robert B. Montague, and other persons acting with them, to your complainant unknown, falsely and fraudulently made and executed fictitious homestead proofs upon said lands hereinbefore described and forged the name of John Reese thereto as applicant and claimant and the names of John F. Foster and Willis Burns as proof witnesses; and the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, to said homestead proofs and subscribed the name of W. F. Hammer, County Clerk, thereto, and made it to appear that said pretended and fictitious claimant John Reese, and said pretended and fictitious witnesses John F. Foster and Willis Burns appeared before and were sworn by said W. F. Hammer, County Clerk; that in and by said homestead proof of the said pretended and fictitious claimant, John Reese, it was falsely and fraudulently made to appear by the said Horace G. McKinley, Robert B. Montague, and other persons to your complainant unknown, that the said John Reese was called as a witness in his own behalf in support of homestead entry No. 13,169, for the southeast quarter of section five (5), township eleven (11) south, range seven (7) east, Willamette Meridian; that he was thirty-two years of age and resided at Sisters Oregon, and that he was a native-born citizen of the United States, having been born in the State of California, and that he established actual residence upon said lands on June 16, 1892, and built a house

thereon in June, 1892; and that he had made improvements thereon consisting of a log-house, 16x20, shed 10x12, hen-house, fruit trees and had cleared three acres, all of the value of Four Hundred ($400.00) Dollars; and that he had built a shed thereon in the fall of 1900; that he was unmarried; that he had been absent from the land about three months each year, mostly in the winter time, working for a living; that he had cultivated two or three acres as he could clear the land for eight seasons; that said homestead claim was not within the limits of any incorporated town or selected site of a city or town, or used in any way for trade and business; that the character of the land was timber and brush and most valuable for grazing. That there were no indications of coal, saline, or minerals thereon, and that the land was more valuable for agriculture than for mineral purposes; that the applicant had not made any other homestead entry and had not sold, conveyed or mortgaged any portion of the land and that the applicant had no personal property of any kind elsewhere than on the claim, and that the applicant had made no other kind of entry under the land laws of the United States; and the said Horace G. McKinley and Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear by the false and pretended proofs of said fictitious persons, Willis Burns and John F. Foster, as proof witnesses, upon said false and pretended homestead entry of the said John Reese, that the pretended facts of the alleged settlement, residence and homestead entry of the

said John Reese, were substantially as set forth in the proof of said John Reese, as homestead claimant.

XII.

That thereafter, on or about the 27th day of December, 1900, the said Robert B. Montague, pursuant to said scheme to defraud the United States out of its said lands, caused said homestead proof of the said John Reese to be transmitted to and filed in the United States Land Office at Oregon City, Oregon; and thereupon on said 27th day of December, 1900, the officers of said Land Office being ignorant of said fraudulent scheme as hereinbefore set forth and being ignorant of the fact that said application, affidavits and homestead proofs, filed in said land office as aforesaid, were false, forged and fictitious and having no means of discovering said facts, Charles B. Moores, Register of said Land Office certified that pursuant to the provisions of Section 2291, R. S. of the United States, John Reese had made payment in full for the southeast quarter of section five (5), township eleven (11) south, range seven (7) east, of the Willamette Meridian, Oregon, and that on presentation of the said certificate to the Commissioner of the General Land Office, the said John Reese, would be entitled to a patent for the tract of land therein described.

XIII.

That thereafter on or about March 17, 1903, the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States, each and all being ignorant of the facts hereinbefore set forth, there was issued in the

name of the said John Reese a patent of the United States, purporting to convey to the said John Reese the hereinbefore described lands.

XIV.

That all of the said false and fraudulent representations hereinbefore set forth were wilfully and knowingly made as aforesaid with the intent of the said Horace G. McKinley, Robert B. Montague, and other persons acting with them and unknown to complainant, to deceive and defraud the United States out of the use of, title to and possession of its lands, and in order that said last mentioned persons might enjoy the benefits accruing therefrom as a basis for lieu land selections as aforesaid, and that your complainant relied upon said false and fraudulent representations so made as aforesaid, and by reason thereof, complainant was induced to execute and issue by its proper officers the patent hereinbefore mentioned and to deliver the same to the said Horace G. McKinley, or Robert B. Montague, or some other person acting with them and unknown to your complainant.

XV.

That thereafter, under date of the 12th day of December, 1901, the said Robert B. Montague made or caused to be made and executed a false, forged and fraudulent warranty deed purporting to convey said southeast quarter of section five (5), township eleven (11) south, range seven (7) east, of Willamette Meridian to G. Otterson; that no such person as G. Otterson existed at said time or at all and the said name was a false and fictitious name adopted

by the said Robert B. Montague for the purpose of disposing of said lands.

XVI.

That thereafter the said Robert B. Montague, under date of the 9th of September, 1903, made or caused to be made and executed a false, forged and fraudulent warranty deed in the name of the said G. Otterson, as grantor purporting to convey said lands to one Asa Owen Garland; thereafter on the 16th day of September, 1903, the said Robert B. Montague caused to be delivered to the said Asa Owen Garland said patent to said lands and said false and pretended deeds of the said John Reese to G. Otterson, and of the said G. Otterson to Asa Owen Garland, and thereupon on the 19th day of September, 1903, the said Asa Owen Garland caused said deeds and said patent to be recorded in the office of the Recorder of conveyances for said Linn County, Oregon, in the manner prescribed by law.

XVII.

That thereafter on or about the 16th day of September, 1903, said Asa Owen Garland executed as required by law a deed of relinquishment of the said lands to the United States, and caused said deed to be recorded on September 19, 1903, in the office of the Recorder of conveyances for Linn County, Oregon, and based upon said relinquishment the said Asa Owen Garland applied to select of the public lands of the United States in lieu thereof the south half of the southeast quarter and the east half of the southwest quarter of section six (6), township nine (9) south, range seven (7) west, Willamette

Meridian, in Polk County, Oregon. That the said application for lieu selection by the said Asa Owen Garland, as aforesaid, was made and filed in the United States Land Office at Portland, Oregon (formerly at Oregon City, Oregon), on said 19th day of September, 1903; that said lieu selection has not yet been approved by the Commissioner of the General Land Office of the United States, and should not be approved as shown by the facts hereinbefore set forth.

XVIII.

That thereafter on the 28th day of September, 1903, said Asa Owen Garland, being then and there an unmarried man, executed and delivered to one Fred S. Chapman his warranty deed purporting to convey the said selected land and all his rights in said selection and all his rights in and to said base lands to said Fred S. Chapman; and thereafter on the 20th day of October, 1903, said Fred S. Chapman executed and delivered to William C. McClure his warranty deed purporting to convey said selected land and all his said rights in and to said base lands to the said William C. McClure.

XX.

That thereafter on the 24th day of April, 1904, said William C. McClure died, leaving a will, bearing date February 23, 1904, which said will was duly probated in the County Court of the State of Oregon, for the County of Polk, and under the terms and conditions of said will and pursuant to said probate thereof, all the property of said William C. McClure, deceased, passed to the defendants, Helen

A. McClure, Charles W. McClure and John J. Rupp, trustees under the said last will and testament of said Willian C. McClure, deceased.

XXI.

That the said William C. McClure, at the time of his death, your complainant is informed and believes, pretended to hold said lands in trust as to an undivided one-fourth interest therein for himself and as to an undivided three-fourths interest therein for the defendants Jethro G. Mitchell and Leroy Brooks.

XXII.

That your complainant is informed that the defendants claim some right, title or interest in or to said lands by virtue of the conveyances hereinbefore set forth, but your complainant alleges that by reason of the facts hereinbefore set forth, said patent to said lands and all of said conveyances hereinbefore mentioned are null and void and in equity should be cancelled, annulled and set aside and all of the pretended claims of the defendants and of all other persons therein should be set aside and held for naught.

Forasmuch therefore, as your complainant is remediless in the premises at and by the strict rule of the common law and is only relievable in a court of equity and in this court, to the end, therefore, that your complainant may have that relief which may only be obtained in a court of equity and in this court, having jurisdiction thereof under the aforesaid facts as alleged, and that the defendants may answer the premises and show, if they can, why your

Demurrer

OF DEFENDANTS HELEN A. McCLURE, CHARLES W. McCLURE AND JOHN J. RUPP, TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF WILLIAM C. McCLURE, DECEASED, AND JETHRO G. MITCHELL AND LEROY BROOKS TO THE BILL OF COMPLAINT OF THE UNITED STATES OF AMERICA, COMPLAINANT.

These defendants by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as is therein and thereby set forth and alleged, demur to said bill of complaint and for cause of demurrer show:

I.

That the complainant is not entitled to sustain said bill, for the reason that the complainant has not in and by its said bill made or stated such a case as entitled it in a court of equity to any discovery or relief from or against these defendants or any of them touching the matters contained in said bill or any of said matters.

II.

That the said bill of complaint affirmatively shows upon the face thereof that these defendants, and each and all of them, were innocent purchasers of the property in question, and are not charged by said bill with any knowledge or information concerning any alleged fraud or illegality in the said title from

the United States or from any of the other parties named in said bill.

III.

That it appears in and by said bill that the persons receiving title from the United States of America as alleged in said bill were persons in actual being, and there is no showing or allegation in the said bill of complaint that they had exhausted their public land rights, and the fact that a fictitious name was used to designate a person in actual being does not authorize the relief prayed for in the bill of complaint.

IV.

The complainant has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief prayed for against these defendants in this, that the Land Department of the United States has exclusive jurisdiction to pass upon the question as to when an applicant for public lands is entited to a patent, and that when the Land Department of the United States has so decided its action is not subject to review by this court or any court.

V.

That complainant is not entitled to sustain said bill for the reason that more than two years have passed since receiver's final receipt was issued to the predecessor of these defendants in chain of title, and under the act of March 3, 1891, where more than two years have elapsed after the issuance of receiver's final receipt and no patent or contest has been filed against said entry the same is not subsequently open

Wherefore, the said defendants Helen A. McClure, Charles W. McClure and John J. Rupp, trustees under the last will and testament of William C. McClure, deceased, and Jethro G. Mitchell and Leroy Brooks demur to said bill of complaint and pray that the same be dismissed.

PLATT & PLATT,

Solicitors for Defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees Under the Last Will and Testament of William C. McClure, Deceased, and Jethro G. Mitchell and Leroy Brooks.

ROBERT TREAT PLATT,

Of Counsel.

United States of America,
District of Oregon,
State of Oregon,—ss.

I hereby certify that it is my belief that the foregoing demurrer of Helen A. McClure, Charles W. McClure and John J. Rupp, trustees under the last will and testament of William C. McClure, deceased, and Jethro G. Mitchell and Leroy Brooks, defendants, to the bill of complaint of the United States is well founded in law and proper to file in the above entitled cause.

ROBERT TREAT PLATT,

Of Solicitors for Defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees Under the Last Will and Testament of William C. McClure, Deceased, and Jethro G. Mitchell and Leroy Brooks.

United States of America,
District of Oregon,
State of Oregon,—ss.

I, Robert Treat Platt, being first duly sworn, depose and say: That I am one of the solicitors of record for the defendants Helen A. McClure, Charles W. McClure and John J. Rupp, trustees under the last will and testament of William C. McClure, deceased, and Jethro G. Mitchell and Leroy Brooks; that I make this oath because said defendants are not, and no one of them is, now within the District of Oregon; that I have read the foregoing demurrer of said defendants to the bill of complaint, and that said demurrer is not interposed for the purpose of delaying said suit or other proceedings therein.

ROBERT TREAT PLATT.

Subscribed and sworn to before me this 23d day of February, 1909.

[Seal] C. G. BUCKINGHAM,
Notary Public for Oregon.

United States of America,
District of Oregon,
State of Oregon,—ss.

Due service of the within demurrer by certified copy thereof as required by law is hereby admitted, at Portland, Oregon, this 24th day of February, 1909.

JOHN McCOURT,
United States District Attorney for the District of Oregon.

Demurrer to bill of complaint. Filed February 24, 1909. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 29th day of November, 1909, the same being the 48th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Overruling Demurrer, etc.]

In the Circuit Court of the United States for the District of Oregon.

No. 3409.

November 29, 1909.

THE UNITED STATES OF AMERICA,

vs.

HELEN A. McCLURE et al., Trustees, et al.

This cause was heard upon the demurrer of defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees, Jethro G. Mitchell and Leroy Brooks, to the Bill of Complaint herein, and was argued by Mr. John McCourt, United States Attorney, and by Mr. Robert T. Platt, of counsel for said defendants. On consideration whereof,

IT IS ORDERED AND ADJUDGED that said demurrer be, and the same is hereby overruled, and it is further ORDERED that said defendants be, and they are hereby, allowed twenty days from this date within which to file an answer herein.

And afterwards, to wit, on the 29th day of November, 1909, there was duly filed in said court an Opinion on the Demurrer to the Bill of Complaint, in words and figures as follows, to wit:

[Opinion.]

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA,

Complainant,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, and JETHRO G. MITCHELL and LEROY BROOKS, ROBERT B. MONTAGUE and HORACE G. McKINLEY,

Defendants.

JOHN McCOURT, District Attorney, for Complainant.

PLATT & PLATT, Attorneys for Defendants.

BEAN, District Judge.

This is a suit to set aside a patent to land in the Cascade Forest Reservation on the ground that it was issued to a fictitious person upon false and fraudulent homestead papers, prepared in the office of the County Clerk of Linn County, by Robert Montague, Deputy Clerk, and Horace G. McKinley.

The bill alleges that after the issuance of the patent, Montague made or caused to be made a deed in the name of the fictitious patentee to one Otterson, who was also a fictitious person, and afterwards executed a pretended deed in the name of Otterson, purporting to convey the land to one Garland. That Garland subsequently made a deed of relinquishment to the Government and caused the same to be recorded and, based thereon, applied to select in lieu of the land described in the patent, other vacant public lands in Polk County, but that the deed has not been accepted or the lieu selection approved by the Land Department. That thereafter the defendants became the owners by proper mesne conveyances of Garland's interest in the selected lands and the lands offered in exchange therefor.

The bill states facts which, if true, entitle the complainant to the relief sought (Moffat vs. U. S., 112 U. S. 24, and U. S. vs. McLeod, just decided) unless Garland's deed of relinquishment precludes the Government from maintaining this suit. It is claimed that when Garland made and recorded his deed and tendered it to the Land Department in exchange for other lands, the title vested in the Government, and that the validity of such title and the right to make a lieu selection is to be determined by the Land Department, and not by the Courts. I do not so understand the effect of the transaction, or the jurisdiction of the Land Department. It is provided by the Act of June 4, 1897 (30 Stat. at Large, p. 36), "that in cases in which a tract covered by an unperfected bona fide claim or by a patent is in-

cluded within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent."

No method of procedure for effecting the exchange is provided by law. The general administration of the Forestry Reservation Acts, however, and the adjudication of the various questions arising therein are vested in the Land Department. It has the power and authority to adopt and has adopted rules and regulations governing the procedure in relinquishing lands within a reservation and the selection of other lands, in lieu thereof, of which the Courts will take judicial knowledge. Cosmos vs. Gray Eagle, 190 U. S. 301.

By the rules and regulations as so formulated, one desiring to relinquish lands and select other lands in lieu thereof, where final certificate or patent has issued, is required to make a quit claim deed to the United States for the land offered in exchange, have it recorded in the proper county and file the same, accompanied by an abstract of title duly authenticated showing a chain of title from the Government back to the United States, to the property offered, in the local Land Office, and at the same time designate the particular tract which he desires in lieu of that relinquished.

30 L. D., Rule 16.

29 L. D., p. 575.

But the title does not pass to the land offered in

exchange until the deed is accepted. The mere execution and recording of a deed and the tender thereof vests no title in the Government. Until the deed and title are examined and approved, it is a mere assertion by the appellant of his title and right to make a selection (Cosmos vs. Gray Eagle, supra, 32 L. D. 233, 34 L. D. 46), but the equitable, if not the legal title remains in him. The deed and tender thereof amounts to nothing more than an offer by the owner to exchange one tract of land for another, and the title does not pass to either party until the exchange is effected. Until the deed is accepted the owner of the land offered in exchange retains title thereto either legal or equitable, and the Land Department has no authority to determine the validity of the title offered if it is defective, or there is some adverse claim thereto. (32 L. D. 209.) All it can do in such a case is to refuse to accept the deed and make the exchange. Its jurisdiction over the matter, so far as the title is concerned ends when it ascertains that there is a defect or irregularity therein. Its duty is to then reject the deed, leaving the contraverted question of title to be determined in some appropriate proceeding in a tribunal having jurisdiction thereof. This rule is not effected, or the jurisdiction of the Land Department extended by the fact that the alleged defect in the title is connected with the issuance of the original patent by the Government. The Land Department has no authority to revoke or cancel a patent. After a patent for public lands is once issued and delivered to and accepted by the grantee, all control of the Executive Depart-

ments over the title ceases. The patent can be set aside or vacated only in a bill in chancery brought by the United States in some court having jurisdiction. Moore vs. Robbins, 96 U. S. 530.

I conclude, therefore, that the Garland deed of relinquishment did not vest the title in the Government, or confer upon the Land Department authority to determine the question whether the patent for such land was procured by fraud and the demurrer should be overruled.

Opinion. Filed November 29, 1909. G. H. Marsh, Clerk.

And afterwards, to wit, on Friday, the 21st day of January, 1910, the same being the 92d judicial day of the regular October, 1909, term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Order Taking Bill of Complaint as Confessed.]

In the Circuit Court of the United States for the District of Oregon.

No. 3409.

January 21, 1910.

UNITED STATES OF AMERICA

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, and JETHRO G. MITCHELL and LEROY BROOKS, ROBERT B. MONTAGUE and HORACE G. McKINLEY.

Now, at this day, comes the plaintiff, by Mr. John McCourt, United States Attorney, and moves the Court for a decree pro confesso against the defendants herein; and it appearing that the defendants, Robert B. Montague and Horace G. McKinley, were each duly served with process of subpoena herein on January 14, 1909, and have each failed to appear or plead to the bill of complaint herein within the time fixed by law and the rules of this court; and that the demurrer filed by the defendants, Helen A. McClure, Charles W. McClure and John J. Rupp, trustees, Jethro G. Mitchell and Leroy Brooks, herein was overruled by the Court on the 29th day of November, 1909, and that said defendants have failed to answer or otherwise plead to said bill of complaint

within the time heretofore allowed by orders of this court;—

IT IS, THEREFORE, ORDERED AND ADJUDGED that the said bill of complaint be, and it is hereby, taken as confessed by said defendants and each of them.

And afterwards, to wit, on Friday, the 14th day of March, 1910, the same being the 129th judicial day of the regular October, 1909, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit:

[Decree.]

In the Circuit Court of the United States for the District of Oregon.

No. 3409.

March 14, 1910.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, JOHN J. RUPP, Trustee Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, and JETHRO G. MITCHELL and LEROY BROOKS, ROBERT B. MONTAGUE and HORACE G. McKINLEY,

Defendants.

Now, on this day this cause coming on to be heard upon the motion of John McCourt, United States Attorney, for final decree herein, and it appearing to the Court that on the 21st day of January, 1910, a decree pro confesso was duly and regularly given and entered herein against the above defendants;

And it appearing to the Court that the allegations of plaintiff's bill of complaint herein are true, and that complainant is entitled to a decree herein in accordance with the allegations and prayer of its said bill of complaint,—

IT IS THEREFORE HEREBY ORDERED, ADJUDGED AND DECREED that the patent of the United States of America, issued upon the 17th day of March, 1903, purporting to convey to one John Reese, the Southeast Quarter (SE. ¼) of Section Five (5), Township Eleven (11) South, Range Seven (7) East Willamette Meridian, Oregon, containing one hundred sixty (160) acres of land, be and the same is hereby cancelled, annulled, vacated and set aside.

AND IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that certain forged deeds and conveyances purporting to have been made and executed by the said John Reese on the 16th day of December, 1901, conveying the above-described land to G. Otterson, and that certain forged deed purporting to have been made and executed by G. Otterson upon the 9th day of September, 1903, pretending to convey said above-described lands to Asa Owen Garland, be and the same are hereby cancelled, annulled, vacated and set aside.

AND IT IS FURTHER ORDERED AND ADJUDGED that the United States of America is the owner in fee simple of the said Southeast Quarter (SE. ¼) of Section Five (5), Township Eleven (11) South, Range Seven (7) East Willamette Meridian in Oregon, containing one hundred sixty (160) acres, free from the rights, claims, interest and liens of all persons whomsoever, and especially of the defendants Helen W. McClure, Charles W. McClure, John J. Rupp, trustee under the last will and testament of William C. McClure, deceased, and Jethro G. Mitchell and Leroy Brooks, and that complainant recover its costs and disbursements herein, of and from the defendants.

R. S. BEAN,
Judge.

Final decree filed March 14, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 21st day of March, 1910, there was duly filed in said court, a Petition for Appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY—#3409.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL, and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon,

Defendants.

Petition for Appeal.

To the Honorable Judges of the Circuit Court of the United States, Sitting in Equity:

The above-named defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, conceiving themselves aggrieved by the de-

cree made and entered on the 14th day of March, 1910, in the above-entitled cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that this appeal may be allowed, and a transcript of the record, proceedings and papers on which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit;

They further say that defendants Robert B. Montague and Horace G. McKinley have refused to join in this appeal, and said Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, deceased, and Jethro G. Mitchell and Leroy Brooks, defendants aforesaid, further pray that citation may be issued and served upon said Robert B. Montague and Horace G. McKinley, defendants aforesaid, requiring them to show cause why they should not join in this appeal or sever their interests from the interests of these defendants.

HELEN A. McCLURE,
CHARLES W. McCLURE and
JOHN J. RUPP,
Trustees Under the Last Will and Testament of William C. McClure, Deceased.

JETHRO G. MITCHELL and
LEROY BROOKS,

By PLATT & PLATT,
Their Solicitors.

ROBERT TREAT PLATT,
Of Counsel.

United States of America,
District of Oregon,—ss.

I, Robert Treat Platt, being first duly sworn, depose and say that I am one of the solicitors of record for defendants Helen A. McClure, Charles W. McClure and John J. Rupp, trustees under the last will and testament of William C. McClure, deceased, Jethro G. Mitchell and Leroy Brooks, defendants in the above-entitled suit, and that the foregoing petition for appeal is true, as I verily believe; that I make this verification because no one of said petitioning defendants is now within the District of Oregon.

ROBERT TREAT PLATT.

Subscribed and sworn to before me this 19 day of March, 1910.

[Seal] C. G. BUCKINGHAM,
Notary Public in and for the State of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within petition for appeal by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 21 day of March, 1910.

JOHN McCOURT,
United States Attorney,
Attorney for Plaintiff.

Petition for appeal filed Mar. 21, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 21st day of March, 1910, there was duly filed in said court an Assignment of Errors, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY—#3409.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL, and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon,

Defendants.

Assignment of Errors on Appeal.

Now, on the 21st day of March, 1910, come defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, by Messrs. Platt & Platt, their solicitors of record, and say that the de-

cree in said cause is erroneous and against the just rights of said defendants for the following reasons:

I.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the plaintiff is not entitled to sustain said bill, for the reason that the plaintiff has not in and by its said bill made or stated such a case as entitles it in a court of equity to any discovery or relief from or against these defendants, or any of them, touching the matters contained in said bill, or any of said matters.

II.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the said Bill of Complaint affirmatively shows upon the face thereof that these defendants and each and all of them were innocent purchasers of the property in question, and are not charged by said bill with any knowledge or information concerning any alleged fraud or illegality in the said title from the United States or from any of the other parties named in said bill.

III.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that it appears in and by the said bill that the persons receiving title from the United States of America as alleged in said bill were persons in ac-

tual being, and there is no showing or allegation in said Bill of Complaint that they had exhausted their public land rights, and the fact that a fictitious name was used to designate a person in actual being does not authorize the relief prayed for in the Bill of Complaint.

IV.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the plaintiff has not in and by its said bill made or stated such a case as entitles it in a court of equity to the relief prayed for against these defendants in this, that the Land Department of the United States has exclusive jurisdiction to pass upon the question as to when an applicant for public lands is entitled to a patent, and that when the Land Department of the United States has so decided, its action is not subject to review by this court or any court.

V.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that plaintiff is not entitled to sustain said bill for the reason that more than two years have passed since Receiver's Final Receipt was issued to the predecessor of these defendants in chain of title, and under the Act of March 3d, 1891, where more than two years have elapsed after the issuance of Receiver's Final Receipt and no protest or contest has been filed against said entry, the same is not

subsequently open to attack, and there is no showing in the Bill of Complaint that any protest or contest was filed within two years after the date of Receiver's Final Receipt.

VI.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the plaintiff is not entitled to sustain said bill for the reason that on the 27th day of December, 1900, it issued its Receiver's Final Receipt for said lands and thereby clothed the holder of said receipt with full legal and equitable right to dispose of said lands, which he did, as shown by said bill, on the 12th day of December 1901; that more than six years have elapsed since the issuance of said Receiver's Final Receipt and said disposition of said lands by the certificate holder named therein, and under the laws and statutes of the United States in such cases made and provided, the time limit within which suit may be brought to set aside said certificate has fully elapsed.

VII.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the plaintiff is not entitled to sustain said bill, for the reason that upon the issuance of a patent to public lands of the United States, the same relates back to the date of the entry, and although patent was issued, as set forth in the Bill of Complaint, upon the 17th day of March, 1903, the

original entry was made in said cause on the 20th day of October, 1900, and the said patent, therefore, relates back to and is of legal effect as of the 20th day of October, 1900 and that more than six years have elapsed since the 20th day of October 1900, before the bringing of this suit; and by the statutes of the United States in such cases made and provided, there has been such lapse of time as that plaintiff is not entitled to maintain its bill or obtain the relief prayed for therein.

VIII.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of plaintiff, on the ground that the plaintiff is not entitled to sustain said bill for the reason that it has been guilty of gross laches in that Receiver's Final Receipt was issued, as shown by the Bill of Complaint, on the 27th day of December, 1900 and thereafter on the 17th day of March, 1903, patent was issued by the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States to the predecessor in title of these defendants, and that therein and thereby the said predecessor in title of these defendants was clothed with full power of disposition of the lands described in the Bill of Complaint; that for more than eight years after the issuance of said Receiver's Final Receipt predecessor in title to these defendants was clothed with full power of disposition of said lands, and said bill is barred by the Statute of Limitations; that there has been undue and unexplained delay on the part

of the plaintiff to bring this suit, that great injustice would be done in this case by granting the relief asked, and that a court of equity should decline to extricate the plaintiff from the position in which it has inexcusably placed itself.

IX.

Because the above-entitled court erred in overruling and not sustaining the demurrer of these defendants to the Bill of Complaint of the plaintiff, for other reasons that are apparent and appear upon the face of the complaint.

X.

Because the above-entitled court erred in rendering and entering a decree as and for pro confesso, in favor of plaintiff and against these defendants, after said demurrer overruled and the refusal on the part of these defendants to further plead.

XI.

Because the above-entitled court erred in rendering and entering a decree adjudging and decreeing that patent of the United States of America, issued on the 17th day of March, 1903, purporting to convey to one John Reese the southeast quarter (SE. ¼) of section five (5), township eleven (11) south of range seven (7) east of the Willamette Meridian, in Oregon, containing one hundred sixty (160) acres, be cancelled, annulled, vacated and set aside.

XII.

Because the above-entitled court erred in rendering and entering a decree cancelling, annulling, vacating and setting aside certain deeds and conveyances

made by said John Reese of the 12th day of December, 1901, conveying the above-described lands to G. Otterson.

XIII.

Because the above-entitled court erred in rendering and entering a decree cancelling, annulling, vacating and setting aside a certain deed executed by G. Otterson on the 9th day of September, 1903, conveying the above-described land to Asa Owen Garland.

XIV.

Because the above-entitled court erred in rendering and entering a decree adjudging that the United States of America is the owner in fee simple of the southeast quarter (SE. ¼) of section five (5), township eleven (11) south of range seven (7) east of the Willamette Meridian, in Oregon, containing one hundred sixty (160) acres.

XV.

Because the above-entitled court erred in rendering and entering a decree adjudging that the United States of America is the owner in fee simple of the southeast quarter (SE. ¼) of section five (5), township eleven (11) south of range seven (7) east of the Willamette Meridian, in Oregon, containing one hundred sixty (160) acres, free from the rights, claims, interests and lien of defendants Helen A. McClure, Charles W. McClure, and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks.

XVI.

Because the above-entitled court erred in rendering and entering a decree that plaintiff recover its costs and disbursements herein of and from the defendants.

Wherefore, said defendants pray that the said decree be reversed and that the above-entitled court may be directed to enter a decree sustaining said demurrer to the bill of complaint and dismissing said bill of complaint on the ground that the same does not state facts sufficient to constitute a cause of suit against these defendants.

PLATT & PLATT,

Solicitors for Defendants Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees Under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks.

ROBERT TREAT PLATT,

Of Counsel.

United States of America,
District of Oregon,—ss.

I, Robert Treat Platt, being first duly sworn, depose and say that I am one of the solicitors of record for Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, defendants in the above-entitled suit, and that the foregoing assignment of errors is true, as I verily believe; that I make

this verification because no one of said defendants is now within the District of Oregon.

ROBERT TREAT PLATT.

Subscribed and sworn to before me this 19 day of March, 1910.

[Seal] C. G. BUCKINGHAM,
Notary Public in and for the State of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within assignment of errors by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 21 day of March, 1910.

JOHN McCOURT,
United States Attorney,
Attorney for Plaintiff.

Assignment of Errors filed Mar. 21, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 31st day of March, 1910, there was duly filed in said court a Summons in Severance, in words and figures as follows, to wit:

Return on Service of Writ [of Summons in Severance].

Form No. 282.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed Summons in Severance on the therein named

Horace G. McKinley by handing to and leaving a true and correct copy thereof with him at Portland, in said District, on the 31st day of March, A. D. 1910.

CHARLES J. REED,
U. S. Marshal.
By W. S. MacSwain,
Deputy.

Return on Service of Writ [of Summons in Severance].

Form No. 282.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed Summons in Severance on the therein named Robert B. Montague by handing to and leaving a true and correct copy thereof with him, at Portland, in said District, on the 25th day of March, A. D. 1910.

CHARLES J. REED,
U. S. Marshal.
By W. S. MacSwain,
Deputy.

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY—#3409.

UNITED STATES OF AMERICA,

Plaintiff, .

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL, and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon

Defendants.

Summons in Severance.

To Robert B. Montague and Horace G. McKinley, Defendants:

You, and each of you, are hereby notified that at the hour of ten o'clock in the forenoon, at the court-room of the above-entitled court, in the city of Portland, State of Oregon, on the 2d day of May A. D. 1910, the undersigned Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, will present to said court their petition for appeal from

the decree rendered and entered on the 14th day of March, A. D. 1910, in the above-entitled suit, returnable to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse said decree rendered against us jointly, and you are hereby invited to unite in said appeal, or failing so to do, you will be deemed to have acquiesced in said decree, and we shall prosecute said appeal without joining you as parties appellant, and shall name you therein as appellees.

HELEN A. McCLURE,
CHARLES W. McCLURE and
JOHN J. RUPP,
Trustees Under the Last Will and Testament of William C. McClure, Deceased,
JETHRO G. MITCHELL and
LEROY BROOKS,
By PLATT & PLATT,
Their Solicitors.

ROBERT TREAT PLATT,
Of Counsel.

United States of America,
District of Oregon,—ss.

Due service of the within Summons in Severance by certified copy thereof, as required by law, is hereby acknowledged at Portland, Oregon, this 21 day of March, 1910.

JOHN McCOURT,
United States Attorney,
Attorney for Plaintiff.

Summons in severance filed Mar. 31, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 3d day of May, 1910, the same being the 20th judicial day of the regular April, 1910, term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding,—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, for the District of Oregon.

IN EQUITY—#3409.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL, and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon,

Defendants.

Order Allowing an Appeal in Severance.

This day came Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, de-

fendants, by Messrs. Platt & Platt, their solicitors of record, and presented their petition for an appeal, and an assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, upon the filing of a bond in the sum of one thousand ($1,000) dollars, with good and sufficient security, to be approved by the Court; and

It further appearing that Robert B. Montague and Horace G. McKinley, defendants herein, were each notified in writing to appear in the above-entitled court at the hour of ten o'clock in the forenoon on the 2d day of May, 1910, which date was the rule day of this court, and either join in said appeal or decline to join in said appeal, and service of said notice was had prior to the April rule day of this court; and

It further appearing that of said defendants neither one has appeared, but each has severed himself and his defense in this court;

The said Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, are hereby granted their several appeals, as aforesaid, and their interests are severed in said appeal from the other defendants Robert B. Montague and Horace G. McKinley, and each of them.

R. S. BEAN,

Judge of the United States District Court, for the District of Oregon.

Dated at Portland, Oregon, this 3d day of May, A. D. 1910.

Order allowing an appeal in severance. Filed May 3, 1910. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3d day of May, 1910, there was duly filed in said court, Bond on Appeal in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.

IN EQUITY—#3409.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN A. McCLURE, CHARLES W. McCLURE, and JOHN J. RUPP, Trustees Under the Last Will and Testament of WILLIAM C. McCLURE, Deceased, all Citizens of the United States and Residents of the State of Michigan, and JETHRO G. MITCHELL, and LEROY BROOKS, Citizens of the United States and Residents of the State of Ohio, ROBERT B. MONTAGUE and HORACE G. McKINLEY, Citizens of the United States and Residents of the State of Oregon,

Defendants.

Bond on Appeal in Severance and for Supersedeas.

Know All Men by These Presents: That we, Helen A. McClure, Charles W. McClure and John

J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, and Jethro G. Mitchell and Leroy Brooks, as principals, and Fred S. Chapman as surety, are held and firmly bound unto the United States of America in the full and just sum of one thousand ($1,000) dollars, to be paid to the said United States of America, its certain attorneys or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this 3d day of May, A. D. 1910.

Whereas, lately at the Circuit Court of the United States for the District of Oregon, in a suit pending in said court, between the United States of America, plaintiff, and Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, all citizens of the United States and residents of the State of Michigan, and Jethro G. Mitchell and Leroy Brooks, citizens of the United States and residents of the State of Ohio and Robert B. Montague and Horace G. McKinley, citizens of the United States and residents of the State of Oregon, defendants, a decree was rendered against said defendants, and said defendants, Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, having obtained an appeal and filed a copy thereof in the Clerk's Office of said court to reverse

the decree in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be holden in the city of San Francisco, in said Circuit, on the 1st day of June, A. D. 1910.

Now, the condition of this obligation is such, that if the said Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks, shall prosecute their appeal to effect and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HELEN A. McCLURE,
CHARLES W. McCLURE and
JOHN J. RUPP,
Trustees Under the Last Will and Testament of William C. McClure, Deceased.
JETHRO G. MITCHELL and
LEROY BROOKS,
By PLATT & PLATT,
Their Solicitors of Record.
FRED S. CHAPMAN. [Seal]

Signed, sealed and delivered in the presence of us as witnesses:

ROBERT TREAT PLATT.
C. G. BUCKINGHAM.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

I, Fred S. Chapman, whose name is subscribed as surety to the within and foregoing Bond on Appeal in Severance, being first duly sworn, depose and say: That I am a resident and freeholder within the said District of Oregon; that I am not a counselor or attorney at law, sheriff, clerk or other officer of any court within said District of Oregon, and that I am worth the sum of two thousand ($2,000) dollars, over and above all my just debts and liabilities, in property subject to execution and sale, and exclusive of property exempt from execution and my property consists of both real and personal property within said District of Oregon.

FRED S. CHAPMAN.

Subscribed and sworn to before me this 3d day of May, A. D. 1910.

[Seal] C. G. BUCKINGHAM,
Notary Public in and for Oregon.

Approved by

R. S. BEAN,
Judge of the District Court of the United States for the District of Oregon.

United States of America,
District of Oregon,—ss.

Due service of the within Bond on Appeal by certified copy thereof, as required by law, is hereby ac-

knowledged at Portland, Oregon, this 3 day of May, 1910.

JOHN McCOURT,
United States Attorney,
Of Attorneys for Plaintiff.

Bond on appeal in severance and for supersedeas filed May 3, 1910. G. H. Marsh, Clerk.

[Certificate of Clerk U. S. Circuit Court to Transcript of Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the Circuit Court of the United States for the District of Oregon, pursuant to the foregoing order allowing appeal, do hereby certify that the foregoing pages numbered from three to sixty-four, inclusive, contain a true and complete transcript of the record and proceedings in said court in the case of the United States of America, Plaintiff and Appellee, against Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees under the Last Will and Testament of William C. McClure, Deceased, and Jethro G. Mitchell and Leroy Brooks, Defendants and Appellants, as the same appear of record at my office and in my custody.

And I further certify that the cost of the foregoing transcript is Thirty Dollars and Twenty Cents, and that the same has been paid by said appellants.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court, at Portland, in said District, this 24th day of May 1910.

[Seal] G. H. MARSH,
Clerk.

[Endorsed]: No. 1858. United States Circuit Court of Appeals for the Ninth Circuit. Helen A. McClure, Charles W. McClure and John J. Rupp, Trustees Under the Last Will and Testament of William C. McClure, Deceased, Jethro G. Mitchell and Leroy Brooks (Defendants), Appellants, vs. The United States of America (Plaintiff), Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Oregon.

Filed May 27, 1910.

F. D. MONCKTON,
Clerk.

No. 1858.

United States Circuit Court of Appeals for the Ninth Circuit

HELEN A. McCLURE, CHARLES W. McCLURE and JOHN J. RUPP, Trustees Under the Last Will and Testament of William C. McClure, Deceased, JETHRO G. MITCHELL and LEROY BROOKS (Defendants),

APPELLANTS,

vs.

THE UNITED STATES OF AMERICA (Plaintiff),

APPELLEE

Brief for Appellants

Upon Appeal from the United States Circuit Court for the District of Oregon.

PLATT & PLATT,
Attorneys for Appellants

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND, OREGON

No. 1858

United States Circuit Court of Appeals

For the Ninth Circuit

HELEN A. McCLURE, CHARLES W. McCLURE and JOHN J. RUPP, Trustees Under the Last Will and Testament of William C. McClure, Deceased, JETHRO G. MITCHELL and LEROY BROOKS (Defendants),

Appellants,

v.

THE UNITED STATES OF AMERICA (Plaintiff),

Appellee.

Brief for Appellants

STATEMENT OF THE CASE.

This case is brought to this Court by appeal from the decree of the Circuit Court of the United States, for the District of Oregon, overruling the demurrer of the defendants and appellants to the bill of complaint.

The complaint alleges in substance that Horace G. McKinley and Robert B. Montague, "with intent to defraud the United States out of the title and possession

to the lands hereinbefore described, and in order that they might secure to themselves the use and benefit of said land as a basis for a lieu selection under the Act of June 4, 1897," concocted an application and other papers necessary to enter lands under the homestead laws in the name of John Reese, who is described in the bill as a fictitious person. It is further charged that the said McKinley and said Montague, one or both of them, concocted the necessary affidavit purporting to be the affidavit of John Reese, together with an affidavit showing improvements and settlement upon the property.

It is alleged that there was no such person as John Reese, but that the name of John Reese, where it appears in the application and affidavits of homestead entry, was written either by Horace G. McKinley or Robert B. Montague, or other persons, and that as a matter of fact no person ever settled upon or made improvements upon the land in question.

It is further alleged that these things were done "in order that the said Horace G. McKinley, Robert B. Montague and other persons acting with them, to your complainant unknown, might thereby falsely and fraudulently acquire title to said lands and secure the benefits therefrom as a basis for a lieu selection under the laws of the United States."

It is further alleged that there was paid to the Receiver of the United States Land Office, at Oregon City, Oregon, the fees of that office, and proper Receiver's receipt was issued therefor.

It is alleged that subsequent proceedings were had by

which notice was published that the homestead applicant expected to prove his residence in cultivation by witnesses named, and that—"the names of the alleged witnesses above mentioned were all false and fictitious names adopted by the said Horace G. McKinley and Robert B. Montague for the purpose of defrauding the United States out of said land."

It is further alleged that "pursuant to said scheme to defraud the United States out of the title and possession to its said lands, the said Horace G. McKinley and Robert B. Montague falsely and fraudulently made and executed fictitious homestead proofs upon said lands, and forged the name of John Reese thereto, as applicant and claimant and the names of John F. Foster and Willis Burns as proof witnesses."

It is further alleged that Robert B. Montague caused the homestead proof to be transmitted to and filed in the United States land office, at Oregon City, Oregon, and that the Register of the land office certified that pursuant to the provisions of Section 2291, R. S. of the United States, John Reese had made payment in full for the land, and would be entitled to a patent for the tract of land described.

It is further alleged, that thereafter "there was issued in the name of the said John Reese a patent of the United States purporting to convey to the said John Reese the hereinbefore described lands."

It is further alleged that all of the said false and fraudulent representations in the bill set out, were made with the intent of the said Horace G. McKinley and Rob-

ert B. Montague, and other persons acting with them, to deceive and defraud the United States out of the use of and title to and possession of its lands, and in order that said last mentioned persons might enjoy the benefits accruing therefrom as a basis for lieu land selections.

It is further alleged that thereafter the said Robert B. Montague made a warranty deed, which is described in the bill of complaint as "false," "forged" and "fraudulent," to G. Otterson, and it is alleged further, there was no such person as G. Otterson, and the said name was a false and fictitious name adopted by said Robert B. Montague for the purpose of disposing of said lands.

It is further alleged, that Montague executed another warranty deed in the name of G. Otterson, which is likewise described as "false" and "fraudulent," to one Asa Owen Garland, and that Montague subsequently delivered to the said Asa Owen Garland the patent to the lands, and deeds of John Reese to G. Otterson, and G. Otterson to Asa Owen Garland, and that said instruments were by Garland placed of record in Linn County, Oregon, where the land described in the patent is located.

It is further alleged that the land in said patent described was within the limits of the Cascade Forest Reserve, and "that thereafter on or about the 16th day of September, 1903, said Asa Owen Garland executed as required by law a deed of relinquishment of said lands to the United States, and caused said deed to be recorded on September 19, 1903, in the office of the Recorder of Conveyances for Linn County, Oregon, and based upon said relinquishment, the said Asa Owen Garland applied

to select of the public lands of the United States in lieu thereof, etc.,'' describing the selected lands.

It is further alleged that said application for lieu selection was filed in the proper United States Land Office, but that said lieu selection has not yet been approved by the Commissioner of the General Land Office of the United States, and the matter is still pending in that office.

It further appears from the complaint that thereafter Asa Owen Garland conveyed the selected land by warranty deed, and by mesne conveyance the same came into the ownership of the appellants. Neither appellants, their immediate grantors, or said Asa Owen Garland are charged with any knowledge of the manner in which patent was acquired or title conveyed by the transaction stated.

The substance of the complaint appears to be that Robert B. Montague, being unwilling to actually settle upon, and improve, a homestead, or having previously exhausted his rights to acquire public land lawfully, and yet desiring to share in the profits offered under a Forest Reserve law, concocted a scheme whereby he sought to acquire a legal title to public land by fraud, under an assumed or fictitious name, supported by fraudulent affidavits and proof, and having procured a patent, passed the land on to an innocent purchaser.

The complaint alleges that the complainant has no relief other than in a Court of Equity, and prays for a decree cancelling, annulling and setting aside the patent and conveyances of the lands as above enumerated,

and divesting appellants of all right in law or equity in the lands in the complaint described. Montague and McKinley were both made parties defendant.

To the complaint, the appellants interposed a demurrer, on the ground that complaint had not stated such a case as entitled complainant, in a court of equity, to any relief as against appellants, they being innocent purchasers of the property and not charged by the bill with any knowledge or information of any flaw or illegality in the title, or of the fraudulent acts of Montague or McKinley.

And for the further ground that it appears from the bill that the person receiving title from the United States was a person in actual being, and the fact that a fictitious name was used did not authorize the relief prayed for.

And on the further ground that the land department of the United States has exclusive jurisdiction.

The demurrer was argued before the Honorable Robert S. Bean, District Judge, and the demurrer was overruled and subsequently a decree was entered in accordance with the prayer of the complaint.

SPECIFICATIONS OF ERROR.

The errors relied upon by the appellants are:

First: Error of the Court in overruling the demurrer filed by the appellants to the complaint.

Second: Error of the Court in entering the decree herein.

POINTS AND AUTHORITIES.

I.

No question is presented in this case as to the good faith and innocence of the appellants.

They were bona-fide purchasers for value, and if the patent passed the legal title their position is unassailable.

II.

It is a settled doctrine of equity that where a grantor has been induced by fraud to part with the legal title to property, he cannot set up that fraud and reclaim the property from subsequent innocent purchasers for value.

Colorado Coal & Iron Co. vs. U. S., 123 U. S. 310-314.

III.

When the Government comes into court and institutes litigation, it is to be treated like any other litigant, and its rights, with few exceptions, are governed by the same rules of law that pertain to citizens.

The Siren, 7 Wall. 152.

The Floyd Acceptances, 7 Wall. 666.

Brent v. Bank of Washington, 10 Pet. 596.

IV.

It is the facts, and not a characterization of those facts, that must alone be considered.

U. S. v. Des Moines Nav. & R. Co., 142 U. S. 510.

Marquez v. Frisbie, 101 U. S. 473.

V.

If there was an actual person in existence, capable of being identified, a patent or deed to him, or conveyance

by or to him, under a fictitious or assumed name, passes the legal title, notwithstanding he may have practiced gross fraud in order to induce the issuance of patent.

Patents:

Colorado Coal & Iron Co. v. United States, 123 U. S. 310-4.

Thomas v. Wyatt, 31 Mo. 188.

Deeds:

Wilson v. White, 84 Cal. 239.

David v. Fire Ins. Co., 83 N. Y. 265.

Staak v. Sigelow, 12 Wis. 267.

Wiehl v. Robertson, 97 Tenn. 458.

Devlin on Deeds, Vol. 1 Par. 191.

Martin v. Brand, 182 Mo. 125.

VI.

The fact that fraud was practiced on the officers of the Land Department or that the officers were induced, by fraud or perjured testimony, to issue the patent, will not authorize a Court of Equity to set aside the patent after rights of innocent purchasers have attached.

Colorado Coal & Iron Co. v. United States, 123 U. S. 310-314.

Vance v. Burbank, 101 U. S. 514.

Steel v. St. Louis Smelting & R. Co., 106 U. S. 447-457.

United States v. Detroit Timber Co., 131 Fed. 668-680.

United States v. Detroit Timber Co., 200 U. S. 320; 50 L. Ed. 499.

VII.

A Court of Equity will not set aside a decision of any properly constituted tribunal because founded upon a false or fraudulent instrument or perjured testimony or for any matter which actually was, or might have been, presented and considered.

(Citing United States v. Throckmorton, 98 U. S. 61-67.)

VIII.

The appropriate officers of the Land Department have been constituted, by Congress, a special tribunal to decide the questions pertaining to public lands, and their decisions are final to the same extent as those of other judicial or quasi-judicial tribunals.

Vance v. Burbank, 101 U. S. 514.

Steele v. St. Louis Smelting Co., 106 U. S. 447-457.

Iron-Silver Mining Co. v. Campbell, 135 U. S. 286.

Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155.

Marquez v. Frisbie, 101 U. S. 473.

IX.

The action of the Land Department in issuing a patent for any of the public lands subject to entry passes the legal title from the Government and vests the legal title in the patentee.

Johnson v. Towsley 80, U. S. 72.

St. Louis Smelting Co. v. Kemp, 104 U. S. 636.

Noble v. Union River Logging Co., 147 U. S. 174.

Moore v. Robbins, 96 U. S. 530, 24 L. Ed. 848-852, at 850.

Steele v. St. Louis Smelting Co., 106 U. S. 447.
U. S. v. Schurtz, 102 U. S. 378

X

The relinquishment set out in paragraph 17 of the complaint re-vested the outstanding title in the United States, and as no patent for the lieu selection has been issued, title to the land selected is still in the United States, and all inquiries and decisions as to whether or not patent shall issue come within the cognizance of the Land Department exclusively.

Brown v. Hitchcock, 173 U. S. 476-479.
U. S. v. Schurtz, 102 U. S. 378.

XI.

The Land Department has power to determine whether the person conveying to the United States by relinquishment is entitled to other land in lieu thereof, and until the Department has acted, courts have no jurisdiction.

Humbird v. Avery, 195 U. S. 480.
Oregon v. Hitchcock, 202 U. S. 70.
City of New Orleans v. Paine, 147 U. S. 261.
Warnekros v. Cowan, 108 Pac. 238.
Kirwan v. Murphy, 189 U. S. 35.

ARGUMENT.

The law is too well settled to require argument and discussion that bona-fide purchasers who actually acquire the legal title to land are protected in their title from the consequences of the fraudulent acts of their predecessors in the title; and it is conceded in this case by the bill of complaint that the appellants occupied the position of innocent purchasers.

Courts of Equity have uniformly been zealous to protect the equities of parties who have acquired the legal title to real property in good faith, against any party who claims to have parted with his title as a result of fraud practiced upon him, irrespective of the question as to whether or not that party might have protected himself against the consequences of such fraud by greater care and watchfulness.

It appears from the complaint that the rights of the appellants were acquired subsequent to the relinquishment and were acquired from one F. S. Chapman, who acquired them from Asa Owen Garland, the party who relinquished the lieu lands to the United States. Neither the good faith of the appellants or of Chapman, or of Garland, is attacked by the complaint. The two preceding conveyances in the chain of title were both executed by Robert B. Montague, using, in the conveyance to Asa Owen Garland, the name of "G. Otterson," there being a previous conveyance to G. Otterson by Robert B. Montague using the name of "John Reese," the patentee.

This presents to the court for decision the question whether or not the title of the United States to the lieu land passed by the patent issued by the United States to a person using the name of "John Reese." The contention on behalf of the Government is based solely upon the allegations in the complaint, that the proceedings which constituted the foundation of the patent to John Reese were altogether fictitious; that John Reese was a fictitious person, and that, consequently, all proceedings were null and void, and that nothing passed by the patent.

This question cannot be determined by the epithets used in the complaint. It is not enough that the complaint alleges that the proceedings were false and fictitious, and that John Reese was a fictitious person. It is necessary to inquire whether or not there actually was a person in being, who made the application for a patent, and to whom patent was issued, such patentee using the name of John Reese, although that was not his own name but a name assumed for the occasion.

We submit that when the complaint is divested of the superfluous adjectives describing the transaction, the conclusion is irresistable that Robert B. Montague filed in the United States Land Office an application for a patent in which he used the name of John Reese, there being at the time no such person as John Reese; and it being competent for Montague to assume that name if he so saw fit, even though it was his intention in so doing to facilitate the commission of a fraud. We may concede, and must concede, that this application, although submitted by Montague and made use of by Montague, was concocted to defraud, supported by fraudulent steps, was

not founded upon residence or cultivation or other compliance with the requirements of the homestead law, and was in pursuance of a wicked attempt, as the bill of complaint alleges (in paragraph 14): "To deceive and defraud the United States out of the use of title to, and possession of, its lands." We may, and we must at this time, concede that the entire proceeding was tainted with fraud and that it was, as alleged in the bill of complaint, in paragraph 4, "With intent to defraud the United States out of the title to and possession of the lands hereinbefore described."

We part company with the Government only when we assert that this intent has been successfully carried out to its consummation, and the United States has been defrauded out of the title, and that title having been transmitted to bona-fide purchasers, it is now too late for the United States to attack the fraud of which it has been the victim.

The complaint described in detail the various and sundry affidavits, sets out the false proofs which were submitted at the time the claim was proved up on, and then in paragraph 12 recites: "Said Robert B. Montague transmitted to and caused to be filed with, the United States Land Office of Oregon City, Oregon (that being the office having jurisdiction over the land in question) the homestead proof."

It will not be contended that Robert B. Montague was not a person in being, and if a person in being applied for and received a patent to a homestead claim, the legal title will pass by such patent. It appears from the bill of complaint that the fees payable to the United States

in connection with this homestead entry were paid in real money by a real person. The entire record was submitted to the Register and Receiver, who, in their quasi-judicial capacity, examined and approved it and allowed the entry and transmitted it, with their recommendation, to the General Land Office at Washington. It further appears that the proper officers of the General Land Office at Washington, although, as alleged in the bill, ignorant of the facts set out in the complaint, issued a patent of the United States conveying to the person using the name of "John Reese" the lands therein described. Although it is alleged that such officers of the United States were induced to execute and issue that patent by reason of the fraud practiced upon them, yet that patent, as alleged by the complaint, was issued and delivered; and it appears from the complaint that the delivery was to Robert B. Montague. True, the allegation of the complaint is, that the officers of the Land Department were induced to deliver this patent to Horace G. McKinley, or Robert B. Montague, or some other person unknown to the complainant, but a subsequent paragraph of the complaint discloses that notwithstanding the alternative language just quoted, the patent was delivered to Robert B. Montague; for it is subsequently alleged that Montague delivered the patent to Asa Owen Garland with the deeds by which Montague, patentee under the name of "John Reese," transferred to Garland the rights acquired by him under the patent.

If this were a suit between the United States and Robert B. Montague, no word of palliation or excuse

could be found for the acts in the complaint alleged, nor will any be attempted, and a Court of Equity would undoubtedly destroy the legal title acquired by Montague by this fraudulent proceeding concocted by himself and his associates to acquire a part of the public lands of the United States.

But the appellants are not charged with knowledge or notice of these fraudulent acts, and were ignorant and innocent thereof, and purchased the right to the selected land for value in good faith, relying, as they had a right to rely, upon the fact that the United States has issued its patent, under seal, and with all the formality usual to that important act, and that such patent, fair and regular in appearance was in the hands of the parties from whom they purchased.

The record was clear and the patent was in the hands of a party who obtained it, with a conveyance of the land thereby patented, from the very party to whom the United States had issued and delivered the patent.

Robert B. Montague used the name of John Reese with intent to wrong and defraud the United States and obtain public land wrongfully, but nevertheless he thereby acquired the legal title and a subsequent bona-fide purchaser acquired both the legal title and the right to protection against any attempt to destroy the rights evidenced by the patent.

The lower court decided this question without discussion, merely citing and relying upon the case of Moffat v. U. S., 112 U. S. 24.

Appellants insist, however, that that case is not conclusive of this case, because the facts were not at all the

same, and there was no actual person (as Montague in this case) perpetrating a fraud on the officers of the Land Department—that was a case wherein the Register and Receiver of the local Land Office of the district embracing the land covered by the patents fabricated the record on which the patent issued.

Because of that fact, the Court held that—

> "The presumption as to the regularity of the proceedings which precede the issue of a patent of the United States for land is founded upon the theory that every officer charged with supervising any part of them and acting under the obligations of his oath, will do his duty, and is indulged as a protection against collateral attacks of third parties. It may be admitted, and, as stated by counsel, that if upon any set of facts the patent might have been lawfully issued, the Court will presume as against such collateral attacks that the facts existed."

But the Court held that that presumption had no application in the case where the officers themselves were committing fraud. We therefore insist that under the very language of this decision, we are entitled to the presumption on behalf of bona-fide purchasers that the officers of the local Land Office passed upon the question that a person in being appeared before them with proofs upon which their action was required, and pursuant to which their decision was given, even though that person came disguised by the assumption of a fictitious name.

And the decision in the Moffat case was based, not upon the fact forged documents were used, but upon the fact that **the officers, constituting the special tribunal,** entered into a conspiracy, the Court saying: "The frauds consist of documents which they had fabricated and presented with their judgment to those having appellate and supervisory authority in such matters, and thus a fictitious proceeding was imposed upon the latter as one which had actually taken place."

In the case at bar, however, no reflection of this nature can be cast upon the officers of the Land Department. They were, it is true, hoodwinked and deceived, but there was an actual record presented to them upon which they passed, and which they transmitted with their judgment to those having appellate authority, by whom the patent was subsequently issued.

The Moffat case is further to be distinguished, as pointed out by the Supreme Court in the case of Colorado Coal and Iron Co. v. United States, 123 U. S. 307, by the fact that the duplicate certificate on which the patent issued was presented to the General Land Office by Moffat himself, who was thus brought into direct connection with the officers who had committed the fraud, and with the transaction before the issue of the patent, and was clearly not an innocent purchaser. That case could have been decided on the ground that Moffat was not a bona-fide purchaser.

The very complaint in the case at bar discloses the presence of living third parties other than Government officials and directly attributes to actual persons, by name, the fraudulent proceedings alleged to have been

perpetrated and forced upon the United States Government.

It is, therefore, our contention that the presence of a living third party entirely removes the fictitious character which the proceedings might otherwise have possessed, and distinguishes the case at bar both in point of fact and on principle from the operation and reason of the rule laid down in the Moffat case.

Where there exists a living individual capable of taking title under what is otherwise and apparently a fictitious name, title is deemed to have vested in such living party.

This proposition has been directly passed upon by the Supreme Court of Missouri. Thomas v. Wyatt, 31 Mo. 188, was an action of ejectment. The facts of this case were that plaintiff obtained his title from a certificate of entry, No. 1786, issued to Samuel Johnson, of Kentucky. Such certificate was afterwards assigned to the plaintiff, J. Thomas, in the name of S. Johnson, and attested by James Coleman. Thomas afterwards brought suit to quiet title and obtained a decree vesting title in said Thomas. Defendant's title was a patent to S. M. Coleman, assignee of S. Johnson, which patent recited the issuance of the certificate to S. Johnson, together with full payment by the latter. S. Coleman, the patentee and son-in-law of James Coleman, conveyed one-half of the tract patented to J. Wyatt, husband of the defendant. James Coleman was a clerk in the Register's office, and it appeared from the evidence that he was a man of bad character, and for such reason had

lost his position. A number of entries signed by S. Johnson and James Coleman, Register, all in the handwriting of James Coleman, were offered in evidence. Among the various applications was the one above. Such a man as S. Johnson had never been heard of. The Court, after reviewing the history of the case, concluded as follows:

> "The ground on which the defendant repelled the plaintiff's right to a recovery was that Johnson was a fictitious person; that there was no such man in being, and therefore the patent was void, and the plaintiff could not derive any title from it or the patentee. There is no doubt that a patent issued to a person not in existence is void. This was the view taken of this case when it was formerly heard. But now we have more light upon it, and although we adhere to the opinion then expressed, we doubt whether it is applicable to the case as it is now presented. The only theory that will solve the question involved in this litigation (and we think there is sufficient evidence to put it to a jury) is, that Samuel Johnson is an assumed name of James Coleman, and not a fictitious person. If we regard Coleman as usurping the name of Johnson when it suited his purposes, we have a clue by which we may be guided to the justice of this case. We have no doubt that this was the light in which this matter was viewed in the court below, but as the case was tried by a jury, we do not conceive that the language of the instruction was sufficiently pointed to direct their attention to the matter really in issue. If James Coleman used the

name of Samuel Johnson to designate himself when he thought proper, and made entry in the name of Samuel Johnson for himself, merely using that name as he would the one by which he was usually known, and endorsed it in the name of Samuel Johnson with the same view, then the transaction is to be regarded as though James Coleman had used instead of the name 'Samuel Johnson' the name 'James Coleman.' So the patent to Samuel Johnson is to be regarded as to James Coleman and not to a fictitious person. I knew an individual once who was sued on an action in which heavy damages were claimed and during its pendency he entered a great quantity of land in his name reversed, or spelled backwards. Now no one supposed that, if a judgment had gone against him, that the title had not passed from the United States so that the land would have been subject to the claim of the creditor. So we suppose it is competent to the party here to prove that James Coleman was Samuel Johnson or James Coleman just as it suited his purposes; that he was a man who used two names; that to effect his ends he endeavored to make it appear that he was two different persons. It matters not whether it was generally known that he went by two names or not. The law is the same though he was known by one name only, as though he was known by both. If a man signs a bond by a name by which he is never called or known, or which he had never used before he would be bound by it. Carpenter v. Williams.'' 28 Mo. 460.

This same doctrine was again recognized by the Supreme Court of Missouri in a very recent decision.

> "The use of the name James T. Mastin in the patent does not necessarily prevent the title from being vested in James T. Martin. By proof aliunde it may be shown that James T. Mastin is identified in the person of James T. Martin, and upon a satisfactory showing in this respect the patent would in fact vest the title in James T. Martin; that the name used in a conveyance is the true name of the party to whom the grant was made does not furnish the test as to the validity of the instrument. It only supplies a means of identification, and the final test of the result of such conveyance is, who in fact was the person to whom the grant was made? The name may furnish you a means of identification, but at last when the identification is made as to the person to whom the grant is made the subject of the grant is vested in such person."

Martin v. Brand, 182 Mo. 125; 81 S. W. 445.

Again the same doctrine has been at least inferentially recognized by the Supreme Court of the United States in the case of the Colorado Coal & Iron Co. v. U. S., 123 U. S. 307.

In the argument in the lower court, counsel for the Government, apparently afraid lest the presence of these real persons would take away whatever fictitious character the proceedings might otherwise be claimed to possess, injected into the case the somewhat novel theory that whoever signed the name of John Reese to the

application, and other papers, committed forgery, and that such forgery invalidated the proceedings. If forgery was committed, it was forgery against the United States, and as there are no common law crimes against the United States, ex parte Hibbs, 26 Fed., page 430, we must look to the Federal Statutes to find what provision is there made in this particular.

Section 5418 of the Revised Statutes provides:

> "Every person who falsely makes, alters, forges * * * * any affidavit or other writing for the purpose of defrauding the United States, or utters or publishes as true, any false and etc. * * * affidavit or other writing for such purpose, knowing the same to be false, etc., or transmits to, or presents to the office of any officer of the United States any such false, etc., affidavit or other writing, knowing the same to be false, etc. * * * shall be imprisoned, etc."

The only direct interpretation of this statute is a decision of Judge Clark, reported in the 11th Federal Reporter. The statute at the time of this decision, while slightly differing in wording, was substantially the same. Passing upon the effect and meaning of the statutes, the Court determined as follows:

> "What, then, is this statute? What is the offense described in it? Is it perjury, or forgery, or both? It is in these words:
>
> "'That if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, or counterfeited, or willingly aid or assist in the false making, altering, forg-

ery, or counterfeiting any bond, bid, proposal, guaranty, security, official bond, public record, affidavit, or other writing, for the purpose of defrauding the United States,' etc.

"The indictments in this case seemed to have been framed upon the idea that the false making mentioned in the statute was in the nature of perjury, because, after reciting the affidavits, they go on to allege in what particulars they are false. But we are satisfied that it is not the true construction of the statute. A little analysis and attention to its language makes this quite apparent. It says, 'If any person shall falsely make, alter, forge or counterfeit.' Now the arrangement and connection of these words, putting the 'False making' with other apt words to describe forgery, to-wit, altering, forging, counterfeiting, indicate its true intent and meaning—that it is aimed at forgery and not at perjury. Again, 'if any person shall falsely make, alter, forge, or counterfeit any bond,' bid, etc. Now, what is the false making of a bond or bid? Certainly not taking a false oath, because the execution of a bond or bid requires no oath. To falsely make an affidavit is one thing; to make a false affidavit, is another. A person may falsely make an affidavit, every sentence of which may be true in fact. Or he may actually make an affidavit, every sentence of which shall be false. It is the 'false making' which the statute makes an offense, and this is forgery as described in all the elementary books. Hawkins says (chapter 70, paragraph 1): 'Forgery, by the common law, seemeth to be an offense in falsely

and fraudulently making or altering any matter of record,' etc. Chitty follows Hawkins, (vol. 3, p. 1022): 'Forgery may be defined to be the 'false making.' ''

United States v. Wentworth, 11 Fed., p. 55.

Again, the Supreme Court of New Hampshire, passing upon a statute which was almost identical with the Federal provision cited, gave the following interpretation of forgery, within the meaning of the act.

"To forge or counterfeit, is to **falsely make**, and an alteration of a writing must be **falsely made** to make it forgery by common law or by our statute. The term **falsely** as applied to making or altering a writing in order to make it forgery has reference not to the contract or tenor of the writing, or to the facts stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains—a writing which is the counterfeit of something which is, or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not. The writing or instrument must in itself be false, not genuine, a counterfeit and not the true instrument which it purports to be."

State v. Young, 46 N. H. 270.

It certainly cannot be contended in the case at bar that the papers executed by Robert B. Montague or

McKinley and his associates were not genuine papers. Said papers were in fact not counterfeits of any genuine papers, but were genuine in themselves. The fact that these very documents passed safely the scrutiny of the various departments evidences in itself their genuineness. The defect in the papers was the falsity of their statements. They were false papers, but not forged papers. In fact, the complaint itself, in paragraph nine, alleges that the name of John Reese was adopted by the said Robert B. Montague and Horace G. McKinley for the purpose of defrauding the United States Government; and it has been held that—

> "It is not forgery when the offense is not the assumption of the name of a supposed third person, but the adoption of an alias or alternative name of the party charged."

Weihl v. Robertson, 97 Tenn. 466 (1896).

Again, even upon this theory as to the question of forgery, the proposition must fail. The intent of the parties who subscribed the name of John Reese was, as the complaint itself affirmatively states, to obtain for themselves vested rights in Government lands; and in every case which counsel cites the intent is not only a necessary, but a vital element; an element so predominantly vital that its absence eliminates the force and effect of all the other elements, and prevents even so much as the possibility of forgery.

Let us look to the reason which impelled these people to employ a fictitious name, and we have a positive clue to their intent. It will, no doubt, be conceded that

Montague and his associates had exhausted their own pre-emption rights; indeed, such would be the only conclusion to which an unbiased and reasoning mind could arrive. Their desire for gain then was curbed to the extent of legitimate acquisition. What other means could they employ? This could be accomplished by adopting another name, and not the name of another. The presence of a selfish interest is the controlling feature. It is the constant intent, not to get what another has, or in relation to which the rights of another have attached; but to get for self, and this is most successfully brought about by submitting to the authorities in power a genuine instrument, the statements of which conceal their falsity under the guise of genuineness. How can it be argued that such was a false making, within the meaning of the statute? The endeavor throughout was to avoid a false making by making a genuine statement of false facts.

It may be contended that such an argument is a technical one in favor of criminals. This would doubtless be the first impression on a mind that can see no other than the Governments' interest. In fact, as between the malefactors and the Government such a contention would no doubt be well made. Such, in fact, would be directly in accord with the ruling of the Moffat case. In determining the case at bar, however, it becomes necessary to ascertain the true and not the apparent intent of Montague and his associates at the time they attempted to perpetrate these frauds; not, indeed, for the purpose of protecting the wrong-doers, but to shield and guard the vested rights of innocent purchasers.

While the criminal law should not be laxly enforced in the favor of criminals, it should not, on the other hand, be stretched in order to establish thereby a right of action attacking holdings which have been honestly acquired. In a Court of Equity such interests are paramount. Interests so acquired must not be divested on the strength of an apparent intent, or even an implied intent, and, as before stated, upon the plaintiff's own theory, the intent of the parties who subscribed the name of John Reese is the one question; and, as disclosed by the complaint itself, the purpose of the parties thus signing this name was to acquire in themselves, the real parties in interest, vested rights in Government land by concealing their own identity under the cloak of an adopted name. The intention clearly was not to simulate the genuine signature of any living man, but merely to conceal identity by adopting an alias or alternative name. Such an act, as already shown by the authorities, may have been fraudulent, may even have been perjury, but upon no theory can it be denominated forgery.

Again, in the case of Allen v. American Loan & Trust Co., 79 Fed. 695, it directly appears from a statement of the facts therein, that a power of attorney was unquestionably forged and with such forged instrument as a basis, patent was issued. While the decision of the Court did not directly discuss the effect of such forgery upon the proceedings, it nevertheless determined that the act complained of merely constituted fraud, and such a fraud as could in no wise affect the interests or rights of bona-fide purchasers acquired thereunder. Had the question of forgery been of any significance it would doubtless

have attracted the attention of the Court, and, as before stated, there was no question as to its existence.

It thus appears beyond any shadow of a doubt that the theory of the Government as to these proceedings being fictitious must fail by the very disclosures of the Government's own complaint, and the proposition as to forgery can be maintained only by adopting illogical refinements and foolish distinctions.

With these two questions disposed of, there remains but one proposition, and that is the admitted fact that the proceedings which antedated the issuance of the patent to John Reese, alias Robert B. Montague, were fraudulent, and perhaps partook of the nature of perjury.

These things in themselves, however, are entirely insufficient to affect or destroy the rights of a bona-fide holder such as the defendants are admitted to be. This last proposition was directly passed upon by the Supreme Court of the United States in the case of Colorado Coal & Iron Co. v. U. S., supra. In that case the following rule was laid down:

> "It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal

title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of bona-fide purchaser for value without notice is perfect.

"In reference to such a case, it was said by this Court in U. S. v. Minor, 114 U. S. 233, 243 (29, 110-114): 'Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value.' Meader v. Norton, 78 N. S. (11 Wall.) 442, 458 (20:184, 188). It is indeed an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value."

Colorado Coal & Iron Co. v. U. S., 123 U. S. 307.

This same doctrine was again reiterated by Judge Hawley in the case of Allen v. American Loan & Trust Co.:

"These are bills in equity to cancel a patent issued September 15, 1864, by the United States to W. S. Chapman, as the agent and attorney in fact for one Charles Musso, upon the ground of fraud. The five cases were tried together. The principles of equity applicable thereto are the same in each case.

"Has the Government, upon the facts stated, shown such a superior equitable right to that of the

defendants to the lands in question as to entitle it to recover? From the stipulated facts, it is apparent that the controlling question in each case is whether the defendants, being bona-fide purchasers of, and having the legal title to, the lands herein involved, without knowledge of the fraud committed upon the government in obtaining the patent through which they derived their title, are entitled to a decree. This question, in the light of the adjudicated cases, is too well settled in favor of the defendants to require any extended discussion. The undisputed facts affirmatively show that a fraud was committed upon the United States, sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patent. But it is manifest that the fraud that was committed was not such as prevented the passing of the legal title by the patent. This being true, it necessarily follows that, to a bill in equity to cancel the patent upon this ground, the defense of a bona-fide purchaser, for value, without notice, is perfect."

Boone v. Chiles, 10 Pet. 177, 209.

Colorado Coal & Iron Co. v. U. S., 123 U. S. 307; 8 Sup. Ct. 131.

U. S. v. California & O. Land Co., 1 C. C. A. 330; 49 Fed. 496.

Id. 148 U. S. 31, 41, 13 Sup. Ct. 458.

U. S. v. Dalles Military Road Co., 2 C. C. A. 419; 51 Fed. 629, 638.

Id., 148 U. S. 49, 13 Sup. Ct. 465.

U. S. v. Winona & St. P. R. Co., 15 C. C. A. 96, 97; 67 Fed. 948, 960.

U. S. v. Southern Pac. R. Co., 76 Fed. 134, 137."

Allen v. American Loan & Trust Co., 79 Fed. 694.

Upon this state of facts as disclosed by the complaint itself, there evidently appears no theory upon which the case of the Government can be maintained, and this is no doubt shown to be equitable and just, for however great may have been the fraud which was perpetrated on the Government, its tribunals had a chance to investigate; in fact, it was the duty of these tribunals to investigate as to these fraudulent acts This has been so held by the Supreme Court of the United States:

"At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the Act of Congress. Upon being satisfied of this fact, and that all the other requirements of the Act had been observed, he was authorized to approve the profile of the road, and cause such approval to be noted upon the plats in the Land Office for the district where such land was located. When this was done, the granting section of the Act became operative, and vested in the railroad company a right-of-way through the public lands to the extent of 100 feet on each side

of the central line of the road. Frasher v. O'Connor, 115 U. S. 102 (29: 311)."

Noble v. Union River Logging R. Co., 147 U. S. 174.

Furthermore, where, in cases of this kind, the sole question becomes that of fraud, the equities of the parties must be weighed, and the balance of Justice always leans in favor of those who are free from wrong, even as against those who are honestly negligent. As was ably concluded by Judge Hawley in the case of Allen v. American Loan & Trust Co., supra:

"The reason for protecting innocent purchasers holding the legal title is that a Court of Equity only acts upon the conscience of the party, and, if he has done nothing which taints it, no demand can attach upon it, so as to give jurisdiction in equity. Clear and strong as the equity of the United States in these cases must be admitted to be, it is self-evident that it is no clearer or stronger than that of the innocent purchasers of the legal title to the lands, who paid a valuable consideration therefor, and have made many valuable improvements thereon in good faith, without any notice of the illegal acts committed by the person or persons who wrongfully and fraudulently obtained the patent from the United States. Justice and equity demand that they should have protection and relief. They committed no fraud. They have acted with a clear conscience, and are not guilty of any wrong. They relied, and had the right to rely, upon the patent issued by the Government in

a case where it had the unquestioned jurisdiction and right to issue the patent. The fact that the Government was imposed upon is not their fault. They cannot be held responsible for the fraud of others, of which they had no notice. The United States has no equitable title to the lands which is superior to the rights of the defendants and bona-fide purchasers thereof.''

The case at bar comes directly within the purview of this doctrine. To enforce the remedy desired in the present instance would not be administering equity, but nurturing inequity. Had not the defendants herein any right to rely upon the Government patent? Must each purchaser investigate in detail and ascertain whether or not fraud has been present in every step preliminary to patent? The very assertion of such a doctrine is a refutation of its own soundness. Patents would cease to be patents. Title would become mere insignia of rights which could exist only in futuro, and then only by proof of a legitimate origin.

We can conceive of no stronger case than the one at bar. Here the bona-fide character of the purchasers is not at issue. It is a fact admitted. No fault is attributed to them. It is merely contended that for a valuable consideration they got nothing, and this, because the Government parted with nothing. If the Government has parted with nothing else, it surely has lost its right to come into a Court of Equity and complain of its own neglect, and make even honest negligence a weapon to destroy the rights acquired by still more honest purchasers. It has

lost the right to make self-allowed imposition the basis of self-protection as against those who had no knowledge of the former, and have no less, but a greater right to the latter.

For its failure to so investigate, not only should the Government be precluded from complaining, but should be compelled to protect the rights of bona-fide holders, who have been doubly defrauded—defrauded in the first instance by the acts of Montague and his associates, and, in the second instance, by having had presented to them a good and valid patent issued from the very authority which now seeks to divest them of vested rights.

Upon this branch of the argument we submit, therefore, that the major premise of the Government case cannot be maintained, and the Moffat case, upon which alone the complaint at bar is based, and on which the lower court rested its decision, is not an authority for the Government's case, but rather for the appellants. When we do, as the Supreme Court said should be done, in the case of U. S. v. Des Moines Nav. R. Co., supra, take the facts in the case, and not the characterization of those facts given by the complaint, we find that the facts, divested of the adjectives "fictitious," "false," etc., so freely used to characterize what was actually done, support the position of appellants as bona-fide purchasers entitled to claim the legal title and with it the equitable title.

True, there was no man whose right name was "John Reese," but there was an actual person in being who used that name to further his fraudulent purposes, and that an actual person submitted the Register and Re-

ceiver an application for homestead entry with the other papers necessary to support the entry. It matters not that all these papers contained false statements.

To the person thus applying, and using the name "John Reese," the United States, under its seal, and the signature of the President, **issued and delivered** a patent, and this patent conveyed the legal title.

Upon this patent a subsequent bona-fide purchaser was entitled to rely, for the credit of the United States stood behind it. Granted, as the complaint alleges, that there was no person whose right name was "John Reese," and that the proof record and affidavits were all false and fraudulent, nevertheless the complaint clearly states that Robert B. Montague was an actual person, using the name of John Reese as an applicant to enter a homestead, even though, as stated, it was with the "intent to defraud the United States out of the title and possession to the lands—and in order that they might secure to themselves the use and benefit of said land as a basis for a lieu selection."

A fictitious person cannot have an "intent to defraud;" only an actual person can have that. The very complaint recognized and stated the distinction between the case at bar and the Moffat case, notwithstanding the adjectives used to characterize the transactions. In the Moffat case no person at all appeared before the officers of the Land Office, and applied to enter public land, but those officials themselves wrote out an application and record. In the case at bar real persons, concealed under what is characterized in the complaint as the "fictitious" name of "John Reese," imposed on the officials of the

Government and secured a patent, and the Government, in its complaint, has clearly recognized this fact, for it has **included as parties defendant the very person who, being an actual person in being, perpetrated the fraud and obtained the patent.**

> "Where a bill sets out a series of facts constituting a transaction between two parties, a demurrer admits the truth of those facts and all reasonable inferences to be drawn therefrom, but not to the conclusion which the pleader has seen fit to aver."
>
> United States v. Des Moines Nav. & R. Co., 142 U. S. 510.

Marquez v. Frisbie, 101 U. S. 473, was decided on a demurrer to the petition, and the Court had occasion to consider and declare insufficient allegations of fraud and fraudulent acts, saying:

> "It is too obvious for comment that in all this the only use of the words 'fraud' and 'fraudulent' is to stigmatize acts which are adverse to the plaintiff's view of his own rights."

No language would be too severe to describe the transaction thus consummated, as between the Government and the wrongdoer, but that does not preclude the appellants from claiming, and being entitled to, the protection the courts have always extended to bona-fide purchasers for value, relying innocently upon a patent under the seal of the United States.

> "We take the general doctrine to be that when in a Court of Equity it is proposed to set aside, to annul

or to correct a written instrument, for fraud and mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."

United States v. Maxwell Land Grant Co., 121 U. S. 325.

"It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient in equity as against the parties perpetrating it, or those claiming

under them with notice of it, to justify the cancellation of the patents issued to them. But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of bona-fide purchaser for value without notice is perfect.

"In reference to such a case, it was said by this Court, in U. S. v. Minor, 114 U. S. 233, 243 (29:110, 114): 'Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title; and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value.'

Meader v. Norton, 78 U. S. (11 Wall.) 442, 458 (120:184, 188).

"It is, indeed an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value."

Colorado Coal & I. Co. v. United States, 123 U. S. 307.

United States v. Throckmorton, 98 U. S. 61-64.

"It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity;

but we think there are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

And the same Court, after quoting as above, went on to say in the case of U. S. v. Des Moines Nav. & R. Co., 142 U. S. 510:

"Even if this be regarded as a bill brought by the United States simply to protect its own interests, and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent, or other evidence of title, issued by the government, in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong, and satisfactory. Muniments of title issued by the Government are not to be lightly destroyed."

IF THE LEGAL TITLE PASSED FROM THE UNITED STATES BY THE PATENT, IT HAS BEEN REVESTED BY THE RELINQUISHMENT, AND THEREFORE THERE IS NO OUTSTANDING TITLE TO WHICH THIS SUIT CAN ATTACH.

The Act of Congress of June 4, 1897, provided:

"That in cases in which a tract covered by an unperfected bona-fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires

to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent: PROVIDED, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

The Interior Department has held in a number of cases that no title passed to the United States by a relinquishment under the act, until the relinquishment and the selection in lieu thereof has been approved by the Commissioner of the General Land Office. In combating this position, we desire to premise that the above act should be so construed, if possible, as to effectuate the intention of Congress, and not to defeat it. No one would deny this rule of construction. (Jones v. N. P. R. Co., 34 L. D. 110.)

The government desired to obtain full title to and control of all lands included within the forest reserve, in order to more effectually police and protect the same. It desired to get such control as soon as possible, as evidenced by the premium offered for such exchange, the right to select in lieu any vacant public land not mineral. Any construction which would necessarily postpone such resumption of title should be avoided.

It will simplify this discussion, if we have recourse to the general principles of law and ascertain what, as

between private parties, are the rights in contracts of exchange.

By the acceptance of the provisions of the act of June 4, 1897, and the relinquishment of lands to the government, a contract of exchange was created between the relinquisher and the United States. Farnum v. Clarke, 148 Cal. 616.

> "Where one of the parties to a contract of exchange has fully performed the contract by conveying or delivering the land which he agreed to give in exchange, upon the failure or refusal on the part of the other party to perform the contract, he may affirm the contract and maintain an action at law for the value of the thing which he should have received, or he may sue in equity for the specific performance. On the other hand, he may rescind the contract, and sue at law for the specific property with which he has parted or the value thereof, or he may sue in equity for the rescission of the contract."
>
> 17 Cyc. Law & Pro. 837-838.

It is essential to a contract of exchange, as the Secretary said in the Moses case, that rights vest at the same time. But it is not essential that mutual conveyance should be made at the same time. Thus when the relinquisher conveyed to the United States, the government acquired, eo instanti, the title, the right of property and the right of possession, and at the same time the relinquisher acquired a vested right of selection.

When one conveys the legal title, the other party

holds the legal estate in the retained land in trust for the one who has conveyed.

The law as to exchange is not something different from the ordinary law of contracts, but merely a part of it. Exchange is merely the transfer of like for like instead of some different consideration.

> "Such a contract, where the lands are to be thus selected by one party, is a valid and enforceable contract, upon the ground that, although the lands are not specificially described in the contract, there is a definite mode of ascertaining them described in the contract, and thus that which would otherwise be uncertain may be made certain."

Lingeman v. Shirk, 43 N. E. (Ind.) 34-5.
Carpenter v. Lockhard, 1 Ind. 434.
Baldwin v. Kerlin, 46 Ind. 426.
Cheney v. Cook, 7 Wis. 357.
Washburne v. Fletcher, 42 Wis. 152.
Roehl v. Hammerexer, 114 Ind. 311-315, 15 N. E. 345.
Colerick v. Hooper, 3 Ind. 316.

A grant by the owner of a certain number of acres in a particular tract would confer a right of selection upon the grantee and authorize him to locate the quantity in any part of the tract he saw proper to elect, upon the principle that a conveyance must be held to pass some interest. . . .

Wofford v. McKenna, 23 Tex. 36.
McCarty v. May, 74 S. W. 804 (Tex. App.).

Oxsheer v. Watt, 91 Tex. 124, 66 Am. St. 863.
Byrn v. Kleas, 15 Tex. Civ. App. 205, 39 S. W. 980.
Paper Co. v. Eaton, 18 Atl. 171 (N. H.).
Stahl v. Van Vleck, 41 N. E. 37 (Ohio).
Brown v. Munger, 44 N. W. 521 (Minn).
Bell. v. Quarles, (Tenn.) 5 Yerg 463.
Loomis v. Wadhams, 8 Gray 557 (Mass.).
Hearst v. Pujol, 44 Cal. 230.
Cobbin v. Hinklin, 70 Pac. 809 (Mont.).

In Territory ex. rel. Devine, Treasurer, v. Perrin (Ariz. 1905). 83 Pac. Rep. 361, the Supreme Court of Arizona had for consideration the identical question here considered, as to when title vests under a deed of relinquishment. The owner of land within a forest reserve executed a deed of relinquishment, under the act of June 4, 1897, and on January 3, 1903, recorded the deed. The Secretary of the Interior approved the abstract and the selection in April, 1903. The Court held that the land was not assessable against the owner after the recording of the deed of relinquishment, the Court saying:

"It is contended by the appellant that although the deeds of relinquishment were filed and recorded on January 31, 1903, the government took no title to the lands until the deeds and abstracts were approved by the Secretary of the Interior and the selection of the lands in lieu of those relinquished were made by the appellee and approved by the Land Department of the government, and, as such selections and approvals were not made until after the first Monday in December, 1903, the lien for taxes for the year

1903, by virtue of the provisions of paragraph 33 of the Revised Statutes of Arizona, attached to the land on the first Monday in February of that year. The provisions of the act of June 4, 1897, under which the lands were relinquished to the government, provides: 'That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof, a tract of vacant land open to settlement, not exceeding in area that tract covered by his claim or patent.' It will be observed that the act itself makes no provision as to the manner in which the relinquishment to the government shall be made. The whole subject is left under the control of the Land Department of the government." (Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301.)

"There is nothing in the act of Congress which makes the vesting of title in the United States to the relinquished lands dependent upon the selection of the lands granted in lieu thereof. The appellant urges that this being an exchange of lands, the title does not vest in the government until the selection of the lieu lands has been made and approved. We are unable to concur with this contention. In our view of the statute the legal title vested in the United States upon the filing for record of the deed of relinquishment, subject, perhaps, to be divested should the Secretary of the Interior disapprove of the

abstracts of title. The consideration for the grant is the right, under the law, to select other lands in lieu of those relinquished. After the deed is recorded and delivered the grantor cannot, by any act of his, encumber the title as against the United States. He has no title to the land which he can enforce.

"We have carefully examined the opinion of the Supreme Court in the case of Cosmos Exploration Co. v. Gray Eagle Co., supra, and find nothing therein in conflict with these views. The question there presented was the time when the title vested to lands in lieu of lands relinquished, and the Court held that such title vested only after the approval of the selection by the Land Department of the government."

What was held by the courts in the case of Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, was that the courts were **without jurisdiction to pass upon** the question as to where the title rested pending a determination of the land office. And this brings us to the question of jurisdiction, although we believe the Court may properly reverse this case without considering the question of jurisdiction.

JURISDICTION.

An examination of the complaint in this case discloses that the real object is to prevent the appellants from acquiring the lands selected by them in lieu of that relinquished, and while nominally one of the objects of the suit is to cancel the patent, yet in view of the fact

that whatever rights were outstanding have been relinquished, the real object of the suit is to prevent the patenting of the selected lands. In other words, the Court is asked to forestall the action of the land office and prejudge a matter pending in that tribunal.

The complaint alleges (Par. 17) that the application for lieu selection was made and filed in United States Land Office at Portland, Oregon, September 19, 1903, and "that said lieu selection has not yet been approved by the Commissioner of the General Land Office of the United States, and should not be approved as shown by the facts hereinbefore set forth."

In the paragraph in the complaint just quoted, is the real gist of the complaint, and as we contend, is an attempt to have the Court do what it has always disclaimed the power to do, advise the land department as to whether or not they should approve the selection.

That the courts are without power to do this is precisely what was held in the case of Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 301, from which case we quote at some length:

> "An examination of the complainant's bill shows that it does not ask for an injunction until the decision of the Land Department upon the matters pending therein. The complainant ignores those proceedings so far as to claim now the final adjudication by the Court, based upon its alleged equitable title to a three-quarters interest in the land selected, and it avers that the Land Department cannot lawfully refuse or deny the issuance of a patent to Clarke. It

avers that the protest filed by the defendants is insufficient to impair or affect the validity of the selection of land made by complainant's assignor. The Court is, therefore, called upon in advance of and without reference to the action of the Land Department, to determine complainant's right and title to the three-quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, while the question in relation to the title is still properly before the Land Department, and not yet decided."

"There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department."

Whatever may be the ultimate determination of the question as to whether or not the full title vests in the United States upon the relinquishment, and as to when a selector, properly qualified, acquires the equitable title, to the land selected, it is clear that all these questions are in the first instance to be determined by the Land Deparment, subject only to review in the Courts for errors in the application of the law in any particular case.

The United States has a right reserved that it may not approve (through its Land Department) until it has found the relinquishment and selection to be proper.

The Land Department has jurisdiction to determine this question, and it is an integral part of that determination to decide that the party relinquishing, has title to the property relinquished, which involves all the questions presented in the case at bar.

Whatever title or color of title there was under the patent has passed to the United States by the relinquishment, and the Land Department has jurisdiction of the only remaining question, which is whether any valid base is offered for the lieu selection.

The complaint in this case seeks relief which, if sustained, will put an end to the proceedings in the Land Office and oust it of its jurisdiction. The respect due from the judicial to the executive department of the government, if no other reason existed, would justify the courts in refusing jurisdiction under such facts.

And it was the holding of the Supreme Court in the Cosmos case that courts cannot be called upon, in advance of and without reference to the action of the Land Department, to determine the right and title of a person who surrendered lands under the act of June 4, 1897, and selected others, to the land so selected, or to render a final decree determining the interest of the parties to the action in such lands, while the questions in relation to the title are still properly before the Land Department and have not yet been decided.

It must be remembered that the original application by Montague to enter a homestead was made in December, 1900, and that patent was issued March 17, 1903. Why the government delayed through these years to bring any proceedings attacking said patent, has not

been explained, but if the proceedings had been brought, as they might have been, before the relinquishment, and before the Land Department again acquired jurisdiction by the application to select other lands in lieu of the relinquished lands, then a case would have been presented which, by the issuance of the original patent, had then passed from under the control of the Land Department, to be governed by the equitable considerations which we have hereinbefore discussed, and the only question presented would have been the rights of a bona fide purchaser for value without notice.

But whatever rights the appellants, as such bona fide purchasers, held, they have voluntarily conveyed to the United States, by acceptance of the offer contained in the act of June 4, 1897, and have submitted to the Land Department an application to select other lands in lieu thereof; so that the substance of this action is not to protect the right of the United States in the lands covered by the homestead entry, for it is already protected as to that land by the relinquishment, but it is rather to prevent the selector from acquiring the selected land. It is therefore in substance and in form a proceeding to anticipate the action of the Land Department and usurp the jurisdiction properly belonging to that tribunal.

In the opinion of the lower Court is cited 32 L. D. 209 as an authority for the statement that the Land Department is without jurisdiction.

But we respectfully suggest that that case supports our contention, because the Land Department **did take jurisdiction,** and did pass upon the selection.

If, as the lower Court in the case at bar said of the Land Department, "Its duty is to then reject the deed," it must have jurisdiction. The power to reject **necessarily** implies the power to approve. If it **can** act at all, it **must** act as its view of the facts and the law determines. If mistaken as to the law, its action can be reviewed, but until the matter has passed from the Land Office by rejection of the selection, if it shall so decide, or by approval, and issue of patent, if that seem demanded by those equitable considerations governing its actions, a Court cannot assume to act.

In the case of Humbird v. Avery, 195 U. S. 503, the Supreme Court said:

> "We are of opinion that the bill should have been dismissed upon the ground that a court of equity should not in advance of the final action of the Secretary of the Interior in respect of lands embraced by the act of 1898, interfere with the regular and orderly administration of its provisions by means of a decree directed against claims under that act, and without now expressing any opinion as to what question may be raised by claimant after such final action by the Land Department under that act, we adjudge that such dismissal must be without prejudice to any suit that may according to established principle, be rightfully instituted by claimant after the jurisdiction of the department in respect of any particular lands as seized."

The facts of this case make it peculiarly in point in

consideration of the case at bar. In the course of its consideration the Court said:

"It is true that no order is asked here that will directly or in terms operate upon the Land Department, but a decree is asked as between the parties now before the Court, which must necessarily control or affect the action of the department in respect of matters committed to it by Congress."

And then, after discussing the fact that either the individual claimant or the railroad company in case of relinquishment may select other lands, the Court said:

> "The duty of a court of equity not to interfere with parties in the prosecution of their rights under the act whereby the execution of its provisions in advance of final action by the department would be embraced by the judicial decision is quite as imperative in case of patented land in dispute as in the case of unpatented lands."

As was said by the Supreme Court in Litchfield v. The Register & Receiver, 9 Wall. 575, and quoted and approved in Kirwan v. Murphy, 189 U. S. 35:

> "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then, in an appropriate proceeding, determine who has the better title or right."

The rules which will govern the Land Department in consideration of these questions, however, are the same as those which would apply had the matter been left to the courts, as it would have been but for the special jurisdiction of the Land Department, as was said by the department in the case of Aztec Land & Cattle Company v. Tomilson, 35 L. D. 161.

> "The Land Department has jurisdiction to determine the equitable, as well as legal, rights of the parties claiming interests in public lands, as no other tribunals have jurisdiction, and it is the duty of the department to recognize equities such as courts recognize."

The fact that the demurrer admits for the purposes of this case the allegations of the complaint, does not make those facts any the less allegations of facts of matters of which the Land Department has jurisdiction.

The Land Department is, as a matter of law, as competent to pass upon these questions of fact, whether controverted or admitted, as other tribunals, and by law its jurisdiction is exclusive in the first instance.

In conclusion, we respectfully submit that this case should be considered from the viewpoint of bona-fide purchasers for value, who have invested their money, relying upon a record having as its foundation a patent issued by the United States under its seal, executed and delivered in due form, with nothing anywhere on the record to arouse even a suspicion on the part of the purchasers.

As against these innocent purchasers no weight should be given to the fact that the party who procured this patent practiced fraud to obtain it, it being an irresistible conclusion of fact from the record that such person actually made application, defrauded the land officials into approving his application and obtained a patent under the name assumed for the occasion. We respectfully urge the Court to reverse this case on the ground that the appellants are bona fide purchasers for value, holding and entitled to claim through a patent of the United States.

Respectfully submitted.

PLATT & PLATT,
Attorneys for Appellants.

No. 1858.

United States Circuit Court of Appeals

For the Ninth Circuit

HELEN A. McCLURE, CHARLES W. McCLURE and JOHN J. RUPP,

TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF WILLIAM C. McCLURE, Deceased; JETHRO G. MITCHELL and LEROY BROOKS, (Defendants)

APPELLANTS

VS.

THE UNITED STATES OF AMERICA,

(PLAINTIFF)

APPELLEE

Brief for Appellee

Upon Appeal From the United States Circuit Court for the District of Oregon

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JOHN McCOURT

UNITED STATES ATTORNEY FOR THE DISTRICT OF OREGON

PORTLAND PRINTING HOUSE CO., TENTH AND TAYLOR STREETS

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Brief for Appellee

STATEMENT OF THE CASE.

This suit was commenced by appellee in the Circuit Court for the District of Oregon, on the 24th day of December, 1908. Appellants demurred to the bill of complaint upon the ground generally that the bill did not state a case entitling appellee to the relief prayed for, and upon the further ground that the court had no jurisdiction, the land in question having

been tendered to appellee as a basis for a forest lieu land selection.

The demurrer also raised a question upon the statute of limitations, but appellants do not seem to be urging that question upon this Court.

Thereafter, on the 29th day of November, 1909, appellants' demurrer was overruled by the Court, and they having refused and neglected to plead further, a decree was granted and entered on the 14th day of March, 1910, in accordance with the prayer of the bill.

The bill of complaint is designed to exhibit to the Court certain transactions wherein one, Horace G. McKinley, and Robert B. Montague, then Deputy County Clerk, of Linn County, Oregon, forged and fabricated in the name of a fictitious person, all of the papers in a pretended homestead entry, of lands lying in the Cascade Forest Reserve, in Oregon. The papers so forged and fabricated showed a complete and perfect homestead entry and proof thereon, and were forwarded to, and filed with, the proper land officers of the United States, as having been made before, and coming from, the County Clerk of Linn County, Oregon, when in truth and in fact no such entry was ever made, and no such person existed as the entryman named.

The facts are stated fully and in detail in the bill and a better idea of the case can be gained from reading the same than from any attempted statement of facts herein. Omitting formal parts thereof, the bill of complaint follows:

I.

That at all the dates and times between the 1st day of July, 1900, and the 1st day of July, 1904, one W. F. Hammer was duly elected, qualified and acting County Clerk of Linn County in the State of Oregon and at all said times one Robert B. Montague was deputy clerk of said Linn County, State of Oregon. That among the duties and authorities imposed upon and reposed in the said W. F. Hammer as such county clerk was the taking of applications and proof upon homestead entries under the laws of the United States; and the said W. F. Hammer at all said times and dates authorized his said deputy, Robert B. Montague, to take such homestead applications and proofs and administer the requisite oaths thereon in his name and stead, and authorized the said Robert B. Montague to affix the official seal and signature of the said W. F. Hammer as such county clerk to said homestead applications and proofs.

II.

That on or about the 28th day of September, 1893, the President of the United States duly and regularly reserved, set aside and established what is known as the Cascade Forest Reserve in the State of Oregon, which said Forest Reserve among a large quantity of other lands of the United States embraced and included, and does embrace and include, the hereinafter described lands.

III.

That at all the dates and times hereinafter mentioned the United States of America was and is now the owner of the southeast quarter of section five (5), township eleven (11) south of range seven (7) east of Willamette Meridian, containing one hundred sixty (160) acres. That said lands were prior to the 28th day of September, 1893, unappropriated public lands of the United States, and thereafter and ever since said time and are now reserved and set aside as a part of said Cascade Forest Reserve under and by virtue of the reservation made thereof by the President of the United States as aforesaid.

IV.

That on and prior to the 20th day of October, 1900, one Horace G. McKinley, the said Robert B. Montague and other persons to complainant unknown, taking advantage of the pretended authority conferred upon the said Robert B. Montague as such deputy clerk of Linn County, Oregon, and with intent to defraud the United States out of the title and possession to the lands hereinbefore described, and in order that they might secure to themselves the use and benefit of said land as a basis for a lieu selection under the Act of June 4, 1897 (30 Stats. L., page 36), falsely and fraudulently forged an appli-

cation and affidavit to enter said lands under the homestead laws in the name of John Reese, a fictitious person; and the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, to said affidavit of homestead entry, and subscribed the name of W. F. Hammer, County Clerk, thereto, and thereupon said Horace G. McKinley and the said Robert B. Montague caused said application and affidavit of homestead entry to be filed in the United States Land Office at Oregon City, Oregon, on the said 20th day of October, 1900.

V.

That in and by said false and fraudulent and fictitious application to enter said lands as aforesaid, the said Horace G. McKinley, Robert B. Montague and other persons to complainant unknown falsely and fraudulently made it to appear that the said John Reese resided at Sisters, Oregon, and that he applied to enter said lands under Section 2289, R. S. of the United States; and in and by said false, fraudulent, fictitious homestead affidavit the said Horace G. McKinley, Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear that John Reese, of Sisters, Oregon, did solemnly swear that he was not the proprietor of more than one hundred sixty (160) acres of land in

any State or Territory; that he was a native-born citizen of the United States, over the age of twenty-one, and that his application to enter said lands was made honestly and in good faith for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation and that he would faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence and cultivation necessary to acquire title to the land applied for, and that he was not acting as agent of any person, corporation or syndicate in making such entry nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon. That he did not apply to enter the same for the purpose of speculation but in good faith to obtain a home for himself, and that he had not directly or indirectly made and would not make any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself; and further that since August 30, 1890, he had not entered under the land laws of the United States or filed upon a quantity of land agricultural in character, not mineral, which with the tracts then applied for would make more than three hundred twenty (320) acres and that he had not theretofore made any entry under the homestead laws.

VI.

That at the time the said Horace G. McKinley and Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made, subscribed and caused to be filed the hereinbefore application and affidavit of homestead entry in the name of the said John Reese, a fictitious person, they also falsely and fraudulently caused to be executed an affidavit under the provisions of Section 2294 of the Revised Statutes of the United States, and falsely and fraudulently forged the name of John Reese thereto as a claimant for homestead entry and as the affiant in said affidavit and caused the same to be filed in the United States Land Office at Oregon City, Oregon, together with the application and affidavit hereinbefore mentioned; that in and by said last mentioned affidavit the said Horace G. McKinley, Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear that the said John Reese, a fictitious person, was a qualified entryman under the homestead laws of the United States, and that the said false and fraudulent application of homestead entry of the said John Reese, was made for the purpose of actual settlement and cultivation and for the exclusive use and benefit of the said John Reese, and not directly or indirectly for the benefit of any person or persons whomsoever, and that the said John Reese was then residing on said lands, and that he had made a bona fide improvement and set-

tlement thereon and that said settlement was commenced June 16, 1892, and that his improvements consisted of a house, fruit trees, small fruits, clearing, and that the value of the same was Three Hundred Fifty ($350.00) Dollars, and that owing to distance and expense the said John Reese was unable to appear at the district Land Office to make said affidavit, and that the said John Reese had never before made a homestead entry. To the last mentioned affidavit, the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, and subscribed the name of W. F. Hammer, County Clerk of said county, thereto.

VII.

That upon the receipt of said homestead application and affidavits aforesaid, Charles B. Moores, Register of the United States Land Office at Oregon City, Oregon, gave to said application the No. 13,169, and attached to said application his official certificate to the effect that said application was made for surveyed lands of the class which the applicant was legally entitled to enter under Section 2289 of the Revised Statutes of the United States and that there was no prior, valid, adverse right to the same.

VIII.

That in truth and in fact no such person as John Reese ever existed, and where the name of John

Reese appears upon said application and affidavits of homestead entry the same was forged by the said Horace G. McKinley, Robert B. Montague, or other persons acting with them, to your complainant unknown; that no person ever settled upon, resided upon, or made improvements upon said southeast quarter of section five (5) in township eleven (11) south, range seven (7) east, Willamette Meridian, prior to the 28th day of September, 1893, or at any other time, or at all; that no improvements of any character were ever placed upon said lands at any time by any person and there are no improvements thereon now, and there never were any improvements thereon; and said false, fraudulent, forged, fictitious and pretended homestead entry of said lands in the name of the said John Reese, was made for the purpose of falsely and fraudulently representing to the officers of the land department of the United States that a homestead right had attached to said lands prior to the setting aside and establishment of said Cascade Forest Reserve, as hereinbefore set forth, and in order that the said Horace G. McKinley, Robert B. Montague and other persons acting with them to your complainant unknown, might thereby falsely and fraudulently acquire the title to said lands and secure the benefits therefrom as a basis for a lieu selection under the laws of the United States.

IX.

That on or about October 23, 1900, the said Horace G. McKinley, Robert B. Montague, or some person or persons acting with them to your complainant unknown, paid to the Receiver of the United States Land Office at Oregon City, Oregon, the sum of Sixteen ($16.00) Dollars, the amount of fee and compensation of the Register and Receiver of said Land Office, upon filing said application and affidavits of homestead entry covering the said southeast quarter of section five (5), township eleven (11) south, range seven (7) east, Willamette Meridian, and thereupon William Galloway, Receiver of said United States Land Office issued a Receiver's receipt for said sum in the name of said John Reese, and thereafter on November 1, 1900, the said Horace G. McKinley and Robert B. Montague, caused to be filed with the Register and Receiver of the United States Land Office at Oregon City, Oregon, a notice in the name of John Reese and to which said last mentioned persons forged the name of the said John Reese, which said notice was to the effect that the said John Reese intended to make final proof to establish his claim to the lands embraced in said false and fraudulent homestead entry, and that he expected to prove his residence and cultivation before W. F. Hammer, County Clerk of Linn County, Oregon, at Albany, Oregon, on December 24, 1900, by two of the following witnesses: Edward Reese, James A. Taylor, Willis Burns, and John F. Foster,

all of Sisters, Oregon; that the names of the alleged witnesses above mentioned were all false and fictitious names, adopted by the said Horace G. McKinley and Robert B. Montague for the purpose of defrauding the United States out of its said lands, there being no such persons existing.

X.

Thereafter upon the 5th day of November, 1900, Charles B. Moores, Register of the Land Office of the United States, at Oregon City, Oregon, being ignorant of the foregoing facts and having no means of ascertaining the same, issued a notice in compliance with the pretended application to make final proof of the said John Reese, and directed that the same be published in the "Criterion," a paper published at Lebanon, Oregon, and thereafter the said Horace G. McKinley, Robert B. Montague and other persons acting with them and unknown to complainant, caused notice of said final proof of the said John Reese to be published in the "Lebanon Criterion" as required by law for six consecutive weeks.

XI.

That thereafter on the 24th day of December, 1900, pursuant to said scheme to defraud the United States out of the title and possession to its said lands,

the said Horace G. McKinley, Robert B. Montague, and other persons acting with them, to your complainant unknown, falsely and fraudulently made and executed fictitious homestead proofs upon said lands hereinbefore described and forged the name of John Reese thereto as applicant and claimant and the names of John F. Foster and Willis Burns as proof witnesses; and the said Robert B. Montague falsely and fraudulently affixed the seal of the County Clerk of Linn County, Oregon, to said homestead proofs and subscribed the name of W. F. Hammer, County Clerk, thereto, and made it to appear that said pretended and fictitious claimant, John Reese, and said pretended and fictitious witnesses, John F. Foster and Willis Burns, appeared before and were sworn by said W. F. Hammer, County Clerk; that in and by said homestead proof of the said pretended and fictitious claimant, John Reese, it was falsely and fraudulently made to appear by the said Horance G. McKinley, Robert B. Montague, and other persons to your complainant unknown, that the said John Reese was called as a witness in his own behalf in support of homestead entry No. 13,169, for the southeast quarter of section five (5), township eleven (11) south, range seven (7) east, Willamette Meridian; that he was thirty-two years of age and resided at Sisters, Oregon, and that he was a native-born citizen of the United States, having been born in the State of California, and that he established actual residence upon said lands on June

16, 1892, and built a house thereon in June, 1892; and that he had made improvements thereon consisting of a log-house, 16x20, shed 10x12, hen-house, fruit trees and had cleared three acres, all of the value of Four Hundred ($400.00) Dollars; and that he had built a shed thereon in the fall of 1900; that he was unmarried; that he had been absent from the land about three months each year, mostly in the winter time, working for a living; that he had cultivated two or three acres as he could clear the land for eight seasons; that said homestead claim was not within the limits of any incorporated town or selected site of a city or town, or used in any way for trade and business; that the character of the land was timber and brush and most valuable for grazing. That there were no indications of coal, saline, or minerals thereon, and that the land was more valuable for agriculture than for mineral purposes; that the applicant had not made any other homestead entry and had not sold, conveyed or mortgaged any portion of the land and that the applicant had no personal property of any kind elsewhere than on the claim, and that the applicant had made no other kind of entry under the land laws of the United States; and the said Horace G. McKinley and Robert B. Montague and other persons to your complainant unknown, falsely and fraudulently made it to appear by the false and pretended proofs of said fictitious persons, Willis Burns and John F. Foster, as proof witnesses, upon said false and pretended homestead entry of the said

John Reese, that the pretended facts of the alleged settlement, residence and homestead entry of the said John Reese, were substantially as set forth in the proof of said John Reese, as homestead claimant.

XII.

That thereafter, on or about the 27th day of December, 1900, the said Robert B. Montague, pursuant to said scheme to defraud the United States out of its said lands, caused said homestead proof of the said John Reese to be transmitted to and filed in the United States Land Office at Oregon City, Oregon; and thereupon on said 27th day of December, 1900, the officers of said Land Office being ignorant of said fraudulent scheme as hereinbefore set forth and being ignorant of the fact that said application, affidavits and homestead proofs, filed in said land office as aforesaid, were false, forged and fictitious, and having no means of discovering said facts, Charles B. Moores, Register of said Land Office, certified that pursuant to the provisions of Section 2291, R. S. of the United States, John Reese had made payment in full for the southeast quarter of section five (5), township eleven (11) south, range seven (7) east, of the Willamette Meridian, Oregon, and that on presentation of the said certificate to the Commissioner of the General Land Office, the said John Reese would be entitled to a patent for the tract of land therein described.

XIII.

That thereafter on or about March 17, 1903, the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States, each and all being ignorant of the facts hereinbefore set forth, there was issued in the name of the said John Reese a patent of the United States, purporting to convey to the said John Reese the hereinbefore described lands.

XIV.

That all of the said false and fraudulent representations hereinbefore set forth were wilfully and knowingly made as aforesaid with the intent of the said Horace G. McKinley, Robert B. Montague, and other persons acting with them and unknown to complainant, to deceive and defraud the United States out of the use of, title to and possession of its lands, and in order that said last mentioned persons might enjoy the benefits accruing therefrom as a basis for lieu land selections as aforesaid, and that your complainant relied upon said false and fraudulent representations so made as aforesaid, and by reason thereof, complainant was induced to execute and issue by its proper officers the patent hereinbefore mentioned and to deliver the same to the said Horace G. McKinley, or Robert B. Montague, or some other

person acting with them and unknown to your complainant.

XV.

That thereafter, under date of the 12th day of December, 1901, the said Robert B. Montague made or caused to be made and executed a false, forged and fraudulent warranty deed purporting to convey said southeast quarter of section five (5), township eleven (11) south, range seven (7) east, of Willamette Meridian to G. Otterson; that no such person as G. Otterson existed at said time or at all and the said name was a false and fictitious name adopted by the said Robert B. Montague for the purpose of disposing of said lands.

XVI.

That thereafter the said Robert B. Montague, under date of the 9th of September, 1903, made or caused to be made and executed a false, forged and fraudulent warranty deed in the name of the said G. Otterson, as grantor purporting to convey said lands to one Asa Owen Garland; thereafter on the 16th day of September, 1903, the said Robert B. Montague caused to be delivered to the said Asa Owen Garland said patent to said lands and said false and pretended deeds of the said John Reese to G. Otter-

son, and of the said G. Otterson to Asa Owen Garland, and thereupon on the 19th day of September, 1903, the said Asa Owen Garland caused said deeds and said patent to be recorded in the office of the Recorder of Conveyances for said Linn County, Oregon, in the manner prescribed by law.

XVII.

That thereafter on or about the 16th day of September, 1903, said Asa Owen Garland executed as required by law a deed of relinquishment of the said lands to the United States, and caused said deed to be recorded on September 19, 1903, in the office of the Recorder of Conveyances for Linn County, Oregon, and based upon said relinquishment the said Asa Owen Garland applied to select of the public lands of the United States in lieu thereof the south half of the southeast quarter and the east half of the southwest quarter of section six (6), township nine (9) south, range seven (7) west, Willamette Meridian, in Polk County, Oregon. That the said application for lieu selection by the said Asa Owen Garland, as aforesaid, was made and filed in the United States Land Office at Portland, Oregon (formerly at Oregon City, Oregon), on said 19th day of September, 1903; that said lieu selection has not yet been approved by the Commissioner of the General Land Office of the United States, and should not be ap-

proved as shown by the facts as hereinbefore set forth.

XVIII.

That thereafter on the 28th day of September, 1903, said Asa Owen Garland, being then and there an unmarried man, executed and delivered to one Fred S. Chapman his warranty deed purporting to convey the said selected land and all his rights in said selection and all his rights in and to said base lands to said Fred S. Chapman; and thereafter on the 20th day of October, 1903, said Fred S. Chapman executed and delivered to William C. McClure his warranty deed purporting to convey said selected land and all his said rights in and to said base lands to the said William C. McClure.

XX.

That thereafter on the 24th day of April, 1904, said William C. McClure died, leaving a will, bearing date February 23, 1904, which said will was duly probated in the County Court of the State of Oregon, for the County of Polk, and under the terms and conditions of said will and pursuant to said probate thereof, all the property of said William C. McClure, deceased, passed to the defendants, Helen A. McClure, Charles W. McClure and John J. Rupp, trustees under the said will and testament of said William C. McClure, deceased.

XXI.

That the said William C. McClure, at the time of his death, your complainant is informed and believes, pretended to hold said lands in trust as to an undivided one-fourth interest therein for himself and as to an undivided three-fourths interest therein for the defendants Jethro G. Mitchell and Leroy Brooks.

XXII.

That your complainant is informed that the defendants claim some right, title or interest in or to said lands by virtue of the conveyances hereinbefore set forth, but your complainant alleges that by reason of the facts hereinbefore set forth, said patent to said lands and all of said conveyances hereinbefore mentioned are null and void and in equity should be canceled, annulled and set aside and all of the pretended claims of the defendants, and of all other persons therein should be set aside and held for naught.

POINTS AND AUTHORITIES.

The bill of complaint herein plainly alleges in effect that Robert B. Montague, taking advantage of the attempted authority vested in him by W. F. Hammer, County Clerk of Linn County, Oregon, to

take homestead applications and homestead proofs, with the assistance of Horace G. McKinley, forged and fabricated a complete record of a homestead application and entry, together with pretended proofs thereon in the name of a mythical and fictitious entryman, and forwarded the same to the officers of the local United States Land Office at Roseburg, Oregon, together with the fees required by law to be paid; that no actual entry of the lands was ever made or intended by Montague or McKinley to be made, and no such person as the John Reese named in the homestead papers ever existed; that such proceedings were thereafter had upon said forged and fabricated homestead entry that a patent was issued by the United States, purporting to convey the lands described in the forged homestead record to John Reese, the mythical and fictitious entryman named therein.

It is further shown that appellants claim title to the lands in question and that they deraign their pretended title from said patent and a deed in the name of said John Reese, forged by said Robert B. Montague.

No charge is made that the defendants had knowledge of the forged and fictitious character of the entry.

Appellants make the following claims:

First: That the complaint shows that some person actually attempted to enter the

lands described in the complaint under the assumed name of John Reese, and that while the statements in the record may be false, yet it was a genuine record made by an actual person. Therefore, the defendants are entitled to the rights of a bona fide purchaser.

Second: That the officers of the United Sates vested with authority over the public land, had presented to them a record of an actual entry and not a mere fabrication, and having passed judgment thereon and issued a patent with such record as a basis, the legal title to the lands passed out of the Government.

Third: That the United States has been re-invested with the legal title to the lands by virtue of a deed of relinquishment, and for that reason, jurisdiction to entertain the present controversy is entirely with the Land Department of the Government.

The bill in this case is founded upon the principle announced in Moffat vs. United States, 112 U. S. 24. That was a case in which the Register and the Receiver of public moneys of the Land Office at Pueblo, Colorado, forged a complete record of two pre-emption entries, together with proofs of settlement and

improvements thereon, one in the name of Phillip Quinlan and the other in the name of Eli Turner, both fictitious persons. The proofs purported to have been made by two witnesses who were also fictitious and mythical persons. The said Register and Receiver also presented a quantity of Agricultural College scrip issued by the State of Florida in the name of the said fictitious person, Phillip Quinlan. In that case the title to the lands had apparently vested in innocent purchasers. The Court, in affirming a decree of the lower court canceling the patents, used the following language:

> "The position that, as the frauds charged were committed by officers of the United States, the Courts erred in not holding their acts to be binding, and in not giving to the patents the force of valid conveyances, is certainly a novel one. The Government does not guarantee the integrity of its officers nor the validity of their acts. It prescribes rules for them, requires an oath for the faithful discharge of their duties, and exacts from them a bond with stringent conditions. It also provides penalties for their misconduct or fraud, but there its responsibility ends. They are but the servants of the law, and if they depart from its requirements, the Government is not bound. There would be a wild license to crime if their acts,

in disregard of the law, were to be upheld to protect third parties, as though performed in compliance with it. The language used in the case of Pope's Lessee against Wendell sanctions no such doctrine. (5 Wheat. 293, 304.) It was there used with reference to collateral attacks upon patents, in cases where the irregularities were committed by officers in the exercise of their admitted jurisdiction, and can have no application to the acts of officers in **fabricating documents in the names of persons having no real existence.**

"The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent **bona fide** purchaser is protected. A subsequent purchaser is bound to know whether there was in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a **bona fide** purchaser, there

must be a genuine instrument, having a legal existence, as well as one appearing on its face, to pass title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

"A strenuous effort is made by counsel to bring these cases within the doctrine declared in United States v. Throckmorton, 98 U. S. 61, and Vance V. Burbank, 101 U. S. 514, but without success. It was held in those cases that the fraud which will justify the setting aside of the judgment of a tribunal specially appointed to determine particular facts, must be such as prevented the unsuccessful party from fully presenting his case, or which operated as an imposition upon the jurisdiction of the tribunal. Mere false testimony or forged documents are not enough if the disputed matter has actually been presented to and considered by the tribunal. Here officers, constituting a special tribunal, entered into a conspiracy; and the frauds consist of documents which they had **fabricated** and presented with their judgment to those having appellate and supervisory authority in such matters; and thus a **fictitious proceeding** was imposed upon the latter as one which had ac-

> tually taken place. It was a fraud upon the jurisdiction of the officers of the Land Department at Washington, and not the mere presentation to them of doubtful and disputed testimony."

The same rule was later reaffirmed by the Supreme Court of the United States in the case of Hyde v. Shine, 199 U. S. 62-80.

The complaint in this case plainly alleges that no such person as John Reese, the entryman, existed, and that he was a fictitious person. The Court in the Moffat case said:

> "The patent being issued to fictitious parties could not transfer the title and no one could derive any rights under a conveyance in the name of the supposed patentee. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one."

The complaint further plainly states that Montague and McKinley, taking advantage of Montague's pretended authority to affix the seal of Linn County and W. F. Hammer, County Clerk, to the homestead application entry and proof, forged an

entire homestead record in the name of John Reese, a fictitious person, as entryman, including proof by pretended but mythical witnesses, and that there never was an actual or attempted entry or settlement upon the lands in question by Reese or anybody else, and that such false, fraudulent, fictitious and forged record was presented to the Land Officers of the United States by the conspirators who represented that the same evidenced an actual proceeding, and said Land Officers being ignorant of the false, forged and fictitious character of said papers and that said pretended entryman was a myth, issued a patent thereon. The Court in the Moffat case says:

> "Here officers, constituting a special tribunal, entered into a conspiracy; and the frauds consist of documents which they had fabricated and presented with their judgment to those having appellate and supervisory authority in such matters; and this a **fictitious proceeding** was imposed upon the latter as one which had actually taken place. It was a fraud upon the jurisdiction of the officers of the Land Department at Washington, and not the mere presentation of doubtful and disputed testimony."

The language quoted would appear to settle the questions raised by defendants' demurrer in favor of the bill of complaint. In this case the defendant was

a fictitious and mythical person. The name John Reese applied to no person, no one applied before Montague as Deputy Clerk, or otherwise assuming to be John Reese, or pretending to enter or apply to enter the lands described in the complaint. The proceeding of applying, entering and making proof upon the lands, did not actually or at all take place. Blank forms prescribed by the Land Department of the United States were filled in by Montague and McKinley with what purported to describe a complete compliance with the law by the entrymen, supported by witnesses who were also fictitious and whose names were also forged. The name John Reese was selected by them and written by them into said blanks in the proper places without such a person existing, and thus was fabricated by them a complete record of a homestead entry. This record they presented over the pretended signature of W. F. Hammer, County Clerk, to those having authority in such matters, and thus a fictitious proceeding was imposed upon the latter as one which had actually taken place, just as was done in the Moffat case. It was, in effect, as though no record whatever had been presented to any of the officers having authority in land matters, and the subsequent issuance of a patent thereon in the name of John Reese has no other effect in law or equity than it would have if the patent had been issued direct to John Reese, a mythical person, without any antecedent record to base the patent

upon. There was, in effect, nothing before the officers of the local land office, the Commissioner of the General Land Office, the Secretary of the Interior or the President of the United States, upon which to pass judgment. No entry had been made, no proof had been given, no applicant for lands under the homestead law by the name of John Reese existed, nor had any one ever attempted to make application for the lands under the name of John Reese; in truth and in fact, as recited in the bill of complaint, what the officers having authority in land matters had before them was nothing, and we submit that "nothing" is insufficient basis for a patent of the United States to lands, especially when said patent is issued in the name of and to a person having no existence.

The patent was set aside in the Moffatt case because there was no patentee, and upon the further ground that the record presented to the land officers did not represent a proceeding that had actually taken place. It is contended that because the record had been fabricated by an officer who had authority only to take applications and take testimony upon proof, when that record was presented to the Register and Receiver and the officers exercising appellate and supervisory control over them, they were required to and did exercise their judgment upon the transactions set forth in the proceedings. But it is plain there were no proceedings and had been none, and instead of the officers exercising

their judgment upon the matters set forth in the papers, no judgment could be passed thereon because the papers did not represent actual transactions.

It was urged in the Court below that because Montague was assisted by McKinley, that fact took away from the name John Reese its mythical character, and made it proper to construe the complaint as alleging that McKinley, under the assumed name of John Reese, made the application. Two persons can commit forgery as well as one, and can thereby perpetuate a fraud by the use of a fictitious name, and the fact that one is clothed with official authority and the other is not, will not make an actual transaction out of that which never occurred, nor will it make existent and real a person who would be mythical and fictitious if the officer acted alone. The lack of official authority in McKinley could not make that actual which never occurred, or give personality to the non-existent entryman.

It is now urged in this Court that the complaint should be construed as alleging that Montague under the assumed name of "John Reese" made an actual entry of the lands in question, and that the homestead proceeding described in the complaint was an actual one containing mere false statements of fact, and that the patent to the lands was issued by the Government to John Reese, alias Robert B. Montague. In other words, it is claimed the complaint alleges that Montague made an entry and proof before himself; that Montague, an actual person under

the name of Reese, appeared before Montague, Deputy County Clerk, and made an actual homestead entry.

In the lower Court, appellants contended that the complaint ought to be construed as though McKinley was entering the lands under the assumed name of John Reese. It is apparent that they have now selected Montague as the recipient of the patent to the lands because it is alleged in the complaint that Montague forged the deeds under which appellants now claim title to the lands. They realize, of course, that a forged deed by Montague would not convey title vested in McKinley, alias Reese.

There is, however, no warrant in the language of the complaint for a construction thereof that places the title in Montague rather than McKinley, and no allegations are pointed out warranting the same.

Appellants say in their brief:

"It will no doubt be conceded that Montague and his associates had exhausted their own preemption rights; * * * *" "Their desire for gain was curbed then to the extent of legitimate acquisition. What other means could they employ? This could be accomplished by adopting another name, and not the name of another. The presence of a selfish interest is the controlling feature."

(Appellants' Brief, page 26.)

And again "as disclosed by the complaint itself, the purpose of the parties thus signing this name was to acquire in themselves, the real parties in interest, vested rights in Government land by concealing their own identity under the cloak of an adopted name."

(Appellants' Brief, page 27.)

Unlawful gain is usually the motive which prompts designing persons to commit forgery, and in no case can rights be acquired by the commission of forgery, whatever may be the motive, and usually, parties committing forgery endeavor to conceal their identity in connection with the crime committed by them, by means of assumed names and other subterfuges.

It is again said in the Brief (page 35):

> "* * * * * The complaint clearly states that Robert B. Montague was an actual person, using the name of John Reese as an applicant to enter a homestead. * * * * *"

Of course he was an actual person and he, together with McKinley, were endeavoring to perpetrate a gross fraud upon the United States and upon the people to whom they expected to transfer the lands later. Actual persons fabricated the preemption records in the Moffat case. No fraud or forgery was ever perpetrated by fictitious or mythical persons. It is always actual persons who are engaged in such

transactions. It is not infrequent, however, that actual persons, by the use of mythical and fictitious names, perpetrate frauds upon individuals and upon the Government.

It is said that the complaint states that Montague was using the name Reese to secure for himself a homestead entry. The complaint states no such thing, but on the other hand states that Montague and McKinley forged and fabricated the papers in an entire homestead entry and transmitted them to the proper land officers and falsely and fraudulently made it to appear that an actual homestead entry and proofs thereon had been made, when no entry of that character had ever been made upon the lands in question, and no such person as the pretended entryman existed.

It is a far cry, from the case where John Smith for some reason best known to himself assumes the name of "Bill Jones," and after taking the latter name appears before a land office and makes a homestead entry and thereafter makes proof upon the same and gets a patent, to the case at bar. In the supposed case, there is an actual entryman making an actual homestead entry, and there is presented to the land officers, clothed with the duty of passing thereon, an actual proceeding evidenced by genuine papers and records. In the supposed case there was an actual entryman, a genuine proceeding and a real grantee. None of these elements are present in the case at bar.

The law is well settled that the signing of a fictitious name to an instrument, with a fraudulent intent, constitutes forgery,

State v. Wheeler, 20 Ore., 192;
Thompson v. State, 49 Ala., 16;
People v. Warner, 104 Mich., 137;
People v. Van Alstine, 57 Mich., 69;
Adkins v. State, 41 Tex., Crim. Rep., 577;
Hocker v. State, 34 Tex. Crim. Rep., 359;
Randolph v. State, 65 Neb., 520.

The opinion of the Court in the Oregon case above cited was written by Justice Bean, the judge presiding in this case, in the Court below, and is a leading case, being reported with a note in 10 L. R. A., 779, and in 23 American State Reports, 119. In that case the essential elements in the crime of forgery are given as

First: False making of some instrument in writing;

Second: Fraudulent intent;

Third: An instrument apparently capable of effecting a fraud:

It is clear, therefore, that an instrument may be forged, even though the party purporting to have executed it has no existence.

Judge Bean, in the Oregon case, further discussing the question, said:

> "The term 'falsely' * * * has reference, not to the contract or tenor of the instrument, or the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited as well as any other; but it implies that the writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. The note must in itself be false, not genuine, a counterfeit, and not the true instrument which it purports to be."

As applied to a record which will be insufficient upon which to base a patent, the terms "forged," "fabricated" and "fictitious" are used in the Moffatt case. These terms are defined as follows:

> Forge: To **fabricate** by false imitation; specifically, in law, to make a false instrument * * * in similitude of an instrument by which one person could be obligated to another with criminal intent for the purpose of fraud and deceit.
>
> Century Dictionary.

Forger: One who makes or issues a counterfeit document.

Century Dictionary.

Forgery: The act of **fabricating** or producing falsely; the making of a thing in imitation of another thing * * * as a legal document, with a view to deceive, mislead or defraud. That which is forged, **fabricated** falsely or fraudulently devised or counterfeited; any instrument which fraudulently purports to be what it is not.

Century Dictionary.

Fabricate: To devise falsely; concoct; **forge** as to fabricate a lie or a story; to fabricate a report.

Century Dictionary.

Fabrication: 2. The act of devising or contriving falsely; fictitious invention; **forgery**; as the fabrication of testimony; the fabrication of a report;

3. That which is fabricated; especially a falsely contrived representation or statement.

Syn. **Fiction,** figment, invention, fable, **forgery.**

Century Dictionary.

Fictitious: Not real; counterfeit; false; not genuine.

Webster's Dictionary.

All of the papers entering into the proceeding described in the complaint were forged. The record as

a whole was fabricated and the transactions it purported to evidence were fictitious, as was the person purporting by the record to be the entryman.

A decree in favor of a fictitious person is a mere nullity and gives no right to any one.

Sampearyrack v. United States, 7 Peters 221-237.

In the last cited case the Court said:

> "The original party to the decree being a fictitious person, no title would pass under the patent, if issued. It would still remain in the United States."

The Land Department has always held that a patent to a fictitious person passed no title from the United States.

United States v. Southern Colo. Coal & Mining Co.,

2nd Gen. Land Office Dec., 790-794; Boggs v West Los Animas Townsite, 5 G. L. O. Dec., 475.

Counsel lays considerable stress upon the case of the Colorado Coal Company v. The United States, 123 U. S., 307. The bill in that case charged that the alleged pre-empters of the land in question therein were fictitious persons. The lower Court found that

the charge in the bill, that the supposed pre-empters and patentees were fictitious persons having no existence, was sufficiently proved and that consequently, there being no grantees, no legal title passed from the United States.

18 Fed., 273.

The Supreme Court after stating:

> "That when in a court of equity it is purposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon the bare preponderance of evidence which leaves the issue in doubt."

observed:

> "In the present case the facts shown are, in our opinion, not sufficient to overcome the presumption of innocence on the part of the register and receiver of the land office. It is quite consistent with these facts that real persons, whether under their own or under assumed names, did actually appear before them and make pre-emption claims. There is no testimony whatever tending to establish directly any complicity on their part with the fraud which may have been

> practiced upon them and not through them. It is certain that there were real persons acting in the matter. The purchase price due on the entry of the lands was in fact paid. There is no proof of any actual fabrication of the papers, the genuineness of which if not negatived by any internal evidence. The allegations in the bill, that they were in fact manufactured by the register and receiver and Hunt, or by any one with their connivance, are entirely unsupported by direct evidence."

After comparing the proof offered in the Moffatt case with the proof in the case before it, the Court directed a reversal of the decree of the lower court, and that the bill be dismissed. The Court held that the government had failed to prove that the entries were forged or fabricated, or that the patentees were fictitious persons, and that in the absence of such proof it would be presumed that the entrymen were actual persons. And even though they made their applications under assumed names, the legal title would pass to them.

Where a person presents himself before an officer clothed with authority to receive applications to enter public lands under an assumed name, and applies to enter lands and thereafter makes proof under such assumed name, when his entry is allowed,

an actual proceeding is created and when the same is presented to the land officers they have before them for consideration a transaction which really occurred and something upon which to base their judgment; and notwithstanding the records may contain false statements as to the name and qualifications of the applicant to enter lands, and of his settlement and improvements, if a patent thereafter issues thereon, it at least passes the legal title to the lands, but that is not a case where the applicant has no existence and the record is false, forged and fabricated, and is in effect the record of no transaction whatever, as appears from the facts stated in the complaint in this case.

The fact that the fabricated papers in this case were completed before they were presented to the land officers first exercising judicial functions in regard thereto, does not distinguish this case from the Moffatt case, where the papers were made and fabricated by the officers first imposed with the duties of exercising judicial functions in land entries. It is the fact that the papers do not evidence any proceeding whatever, that there was, in effect, nothing before the officers to act upon judicially, that invalidates the patent under the doctrine in the case of Moffatt v. the United States. And if the person named in the entry was an actual person and a patent issued to him upon such forged and fabricated record, yet not having applied or pretended to apply for the lands mentioned therein, no title would pass to him upon such forged and fabricated record.

In this case, however, as in the Moffatt case, the entryman had no existence, and for that reason there was no grantee in the patent issued therein. That the fees required by law were paid, is immaterial in considering whether or not there was made an actual entry of the lands in the case. That fact aided the conspirators in defrauding the United States out of its lands, and without it the fraud probably could not have been perpetrated. The payment of the fees, however, in no way added to the reality or falsity of the proceedings.

Robert B. Montague probably had no authority to administer oaths in public land entries. By reason of this lack of authority he was not an officer of the United States and therefore the fabrication of the record in this case was done by private individuals, rather than by officers of the United States, and it is claimed that the fabricated record thus made, having been presented to the local land officers, such officers and their superiors passed judgment thereon. The effect of this contention is that if an individual having access to the County Clerk's office makes out a set of homestead papers, forges the signature of the County Clerk, and affixes his seal thereto, the record does evidence an actual proceeding, and that a patent may be based thereon to the fictitious person named in the papers. The bare statement of the transaction refutes this contention. The question presented in this case is, was the proceeding a fictitious one. This question was not at any time presented to or consid-

ered by the land officers. If Montague had no authority to take land proofs, and the record was entirely made before him, and he signed the name of the County Clerk thereto, that circumstance in itself might invalidate the whole record and leave no basis for the patent in this case, even if it recorded an actual transaction, but we are making no contention on that account in this case.

Appellants make a strenuous claim that they should be regarded as bona fide purchasers but as was said in U. S. v. Moffatt:

> "A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a bona fide purchaser there must be a genuine instrument having legal existence, as well as one appearing on its face to pass title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

II.

It is alleged in the bill of complaint that after the patent to the lands in question had been issued, Rob-

ert B. Montague in furtherance of the conspiracy charged in the complaint, forged a warranty deed purporting to convey the lands in the name of the said fictitious John Reese to G. Otterson, another fictitious and mythical person, and thereafter the said Montague forged still another deed in the name of the said mythical and fictitious G. Otterson purporting to convey the lands to Asa Owen Garland; that thereafter, Garland executed a deed in relinquishment to the United States for said land, and applied to select other public lands of the United States in lieu thereof; that the said lieu selection has not been approved by the officers of the Land Department of the United States and should not be; that thereafter Garland executed a deed in favor of the grantor of the appellants purporting to convey to him all of the title of the said Garland in and to both the selected land and the base land.

These allegations were incorporated in the complaint for the purpose of anticipating an answer on the part of the defendants containing a bare allegation that the lands in question had been reconveyed to the United States without explanation of the conditions under which said conveyance was made, thereby making it appear that there was nothing before the court to litigate.

It was also thought proper to place the facts contained in the allegations mentioned, before the court so that any question arising as to the court's jurisdiction or its right to determine the whole contro-

versy might be presented upon appropriate allegations. It is now claimed by appellants and was so claimed in the lower court that a tender of a deed of relinquishment of the patented lands to the United States, and the application to select lands in lieu thereof vested the determination of all questions concerning both the base lands and the selected lands in the department of the Interior.

On the other hand, it is contended by appellee that the deed of relinquishment and tender thereof to the United States amounts to nothing more than an offer by appellants' grantor to exchange one tract of land for another, and that title will not pass to either party until the exchange is effected by acceptance and approval by the proper officers of the United States. Pending examination and approval of the deed and title, it is a mere assertion by the applicant of his title and right to make selection and the equitable if not the legal title remains in him.

The basis of such equitable title as well as the legal title, is the patent in question. The Land Department has no authority to revoke or cancel a patent; that authority rests exclusively in a court of equity. Cancellation and avoidance of the patent and forged deeds is the relief prayed for by appellee, not rejection of appellants lieu selection.

> "After a patent for public lands is once issued, all control of the executive department over the title, ceases. If fraud, mis-

take, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for cancellation of the deed or reconveyance of the land, as to individuals; and if the Government is the party injured, this is the proper course."

Moore v. Robbins, 96 U. S. 530.

The lieu selection attempted to be made by grantor of appellants was made under the Act of Congress of June 4th, 1897, which provides:

"That in cases in which a tract covered by an unperfected, bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent: PROVIDED, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

The Land Department had power to adopt and did adopt rules and regulations for the administration of the above quoted Act. Courts will take judicial notice of such rules and regulations. The rules and regulations promulgated by the Land Department for the purpose of carrying out the provisions of the Act of June 4th, 1897, are found in 24 Land Decisions, 589, 592.

By such rules and regulations one desiring to relinquish lands in a forest reserve and select other lands in lieu thereof where final certificate or patent had issued, was required to make a quit claim deed to the United States for the land offered in exchange, have it recorded in the proper county and file the same, accompanied by abstract of title duly authenticated, showing a chain of title from the Government to the applicant or selector, and from said selector or applicant back to the United States, to the property offered, in the local land office; and at the same time resignate the particular tract which he desired in lieu of that relinquished.

"By the act of June 4, 1897, the United States offers exchange to the 'owner' of lands in the forest reserve. It is a reasonable construction of that statute that by 'owner' is meant one who has both the legal and equitable title. If adverse claims are made to lands, **the title to which has passed from its jurisdiction, it requires the proponent of title to settle his right and in some manner to terminate that adverse claim** before it will accept his tender, though

legal title may be in him, **for it has no power to adjudicate between him and the adverse claimant.** * * * One wishing to exchange lands under the act of June 4th, 1897, must show that he is in the broad sense owner, not mere holder of the legal title."

33 Land Decisions 78.

"The selector has not acquired title simply because he has selected land which he claims was, at the time of selection, vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it, show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the Government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S., 301, 312.

"Equitable title to the selected lands does not pass to the selector until the proper officers of the Land Department have accepted the deed and approved the selection."

Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S., 301, 310, 311, 312, 313.

"The Supreme Court held in the case of Cosmos Exploration Company v. Gray Eagle Oil Company, (190 U. S., 301,) that a record of a deed purporting to convey lands to the United States and its tender to the land department under the exchange provisions of the Act of June 4, 1897, was a mere assertion by the applicant of his title and of right to make selection, and that no equitable title vested until the title was examined and approved. It is a necessary deduction from this decision that all equitable right of property in the land relinquished remains in the proponent until the title is examined, approved, and accepted by the land department."

32 Land Decisions, 235,
33 Land Decisions, 334,
33 Land Decisions, 589,
34 Land Decisions, 460.

"A selection under the act of June 4th, 1897, is essentially an exchange. Equitable right and title to the lands exchanged necessarily vest at the same time."

"The land has once passed out of the administrative jurisdiction of the land department by issue of the patent upon the original entry. A reconveyance by some one claiming to be owner may or may not vest title in the United States. Whether it does vest title in the United States depends, first upon the question whether he is in fact complete owner free of

any lien, incumbrance, or other claim of title, for the United States will not accept conveyance of title under the exchange provisions of the act unless title is free of adverse claim. **It will not exchange public lands for those concerning which it may have to litigate with its citizens as to its rights.**"

33 Land Decisions, 44.

"Relinquishment of lands and the selection of others in lieu thereof under act of June 4th, 1897, is essentially a contract of exchange. The relinquisher proposes to vest in the United States title and to select an equal area. The Court held in Cosmos Exploration Company v. Gray Eagle Oil Company (190 U. S., 301, 312, 313), that the relinquisher's acts by filing of papers are but a representation that he has title, and that some decision upon the validity of that title must be made by some authorized officer before equitable title vests. Until such decision is made the title is **sub judice.**"

33 Land Decisions, 590.

"It is a transaction of exchange and it is a necessary condition of title by exchange that there is 'a concurrent vestiture of title' to the things exchanged. The New Madrid Act (3 Stat., 211) provided for exchange of private for public lands, and the court held in Lessieur v. Price (12 How., 59, 74) that such vesti-

ture of title occurred when 'the United States assented to the exchange and not until then.' ''

33 Land Decisions, 334.

The Supreme Court in passing on the act of Congress providing for the relief of the inhabitants of New Madrid County, Missouri, whose lands had been materially injured by earthquake, and which act authorized persons owning such lands to select other lands in lieu thereof, (3 Stat. 211) said:

"Instead therefore of its being a pure donation on the part of the Government, it was a proffered barter or exchange of lands by legislative enactment. * * *. A concurrent vestiture of title must have occurred. The injured land must have vested in the United States at the same time the title was taken by the new location.

Lessiure v. Price, 12 Howard, 59, 73, 78.

The foregoing authorities clearly establish, that the transaction provided for by the Act of June 4, 1897, is one of exchange, and that title does not pass to either party until the contract is completed by acceptance of the deed of relinquishment and approval of the selection by the proper officers of the Government. While the decisions of the Land Department are not binding upon the Courts, yet when they are in accord with well considered judicial decisions and

are sound in themselves, they will, upon well known and firmly established principles, be followed by the courts.

The deed of relinquishment to the United States and the application to select other lands, constitutes a mere offer to exchange. Until the offer has been accepted and the selection approved, the selector retains the equitable title to the land relinquished and the Government continues to hold both the legal and equitable title to the land selected. Indeed it is greatly to be doubted, that the deed of relinquishment conveys to the Government even the legal title to the land relinquished. If it does, the Government holds the same as trustee for the owner thereof, pending approval, and continues to hold said legal title as such trustee if the selection is rejected.

At any rate, the equitable title remains in the selector. Surely this alleged equitable title to the relinquished land claimed by appellants is a subject for determination by a court of equity and within the jurisdiction of such a court. Appellants alleged equitable title is based upon the patent in question in this case, as is also the apparent legal title that they have tendered to the Government. The terms "alleged equitable" and "apparent legal" title are used because it is contended by appellee that no title, legal or equitable, passed by virtue of the patent in suit.

Before the appellants' claim of title can be successfully assailed or denied, the patent upon which the same is founded, must be canceled or declared void. This can be done only in a court of equity, in a suit directly attacking the patent and praying for its avoidance or cancellation. The Land Department has no authority to cancel or avoid a patent, and any action it might take relative to appellants' title would be collateral in its nature. A patent cannot be assailed collaterally. The Land Department might reject appellants' application to select the lands applied for upon the ground that they had no title to the lands relinquished. Such action would defeat the selection but would not determine appellants' title to the relinquished lands, neither would it set aside or cancel the patent or restore to the Government the lands described therein; in equity, the situation would be exactly as it was before the offer to exchange was initiated by the deed of relinquishment.

The extent of the jurisdiction of the Land Department over the relinquished land, if the title is not satisfactory, is to reject the offer to exchange. Certainly this narrow authority does not deprive courts of equity of jurisdiction to determine the validity of the patent to such land or to cancel such patent if void.

Without the Act of June 4, 1897, the Land Department has no jurisdiction or authority to declare a patent or a deed void or to cancel the same. We ex-

amine the Act in vain for provisions clothing the Land Department with such authority. No attempt is made by the Act to supersede the jurisdiction of courts of equity in the avoidance and cancellation of deeds and patents.

The law provides no method by which the Land Department may take evidence in such a case to determine the title offered by the relinquisher, nor does it give that department authority to grant any relief in favor of the Government. All the Land Department can do is examine the abstract submitted, and if the title shown thereby is not satisfactory, reject the same and refuse to approve the selection, leaving the matter exactly as it was before the initiation of the selection.

The rule that courts will not interfere in matters within the jurisdiction of a co-ordinate branch of the Government, while the latter is yet performing some legal duty relative to the subject matter, cannot apply here. The Land Department is acting solely in relation to the selected land, determining whether or not appellants are entitled to a patent therefor. Its action relative to the title to the relinquished land is merely incidental to its jurisdiction over the selected land: it cannot disturb or affect the evidence of that title in any way or give any remedy against the same or protection thereto. The relinquished land long since passed out of the control and jurisdiction of the Land Department by virtue of the patent

granted by its authority. Therefore the matter involved in this suit and the remedy prayed for are clearly not within the jurisdiction or authority of the Land Department and it has no power to act in relation thereto. The subject matter is of equitable cognizance and the remedy sought such as a court of equity only can give, it follows that the suit is within the jurisdiction of the lower court.

This suit was commenced at the request of the Land Department in order that appellants might have an opportunity to litigate their claims to the land in an appropriate tribunal clothed with full authority to determine the whole controversy and to grant such remedy as the parties are entitled to under the circumstances of the case.

Had the Land Department, instead, acted arbitrarily in the matter and rejected appellants' selection, the apparent legal title to the relinquished land would have been in the Government. No provision of the law exists for reconveyance to the selector. No action or suit could be brought against the United States to recover the title claimed. The land is located in a Forest Reserve and such title would probably never pass from the Government. Appellants would thereby have lost both the selected and the relinquished land and would be without remedy as to either and would have been deprived of all opportunity to litigate their claims. It is manifest that

appellants are voicing a loud complaint, because the Government granted them the great privilege of litigating their claims in the highest courts of the land instead of summarily barring them from all remedy for the protection of the same. Under the circumstances their complaint is not entitled to great weight.

Moreover, the doctrine that courts have no jurisdiction over the title to lands while the title is in the Government and while the Land Department is exercising jurisdiction over the same, has no application to a case brought by the United States as plaintiff or complainant to secure relief which the Land Department cannot give. That doctrine applies to controversies between private parties. Courts will not entertain suits between private parties while the title is in the Government, because the United States is a necessary party or would be affected directly or indirectly by any decision therein.

The reason for the doctrine is the immunity of the Government from being sued. No such reason exists where the Government brings the suit. The Courts every day entertain all sorts of suits on behalf of the Government to protect its rights of property. And it matters not whether the right the Government seeks to have protected is legal or equitable or whether it concerns real, personal or mixed property. Any property right subject to protection when asserted by

an individual against an individual is entitled to similar recognition and protection when asserted in the Courts by the Government against an individual.

The immunity of the Government from suit sometimes prevents an individual from seeking a remedy against the Government, but such immunity never precludes the Government from securing or protecting its rights against the citizen by entering the courts as plaintiff or complainant.

Appellants say that the real object of this suit is to defeat the lieu selection by securing a decision of the Court in advance of a decision by the Land Department.

Appellants have acquired no rights in the land selected, either legal or equitable, hence there is no right relating thereto that can be determined in this suit. No relief is asked relative to the selected lands The purpose of the suit, as plainly apparent from the bill of complaint and from its prayer, is to avoid and cancel the patent and the forged deeds under which appellants claim title. The Trial Court so understood it, for no mention is made of the selected lands in the decree appealed from.

That avoidance and cancellation of the patent in suit and the forged deeds mentioned may incidentally make approval of appellants' lieu selection im-

possible, furnishes no reason for denying appellee the relief prayed for, neither does it oust the Court of jurisdiction to determine the validity of the patent and deeds in question. It might as well be said that where the incidental effect of a decree in equity would deprive a party of a money benefit, jurisdiction of the controversy is in all such cases at law and not in equity.

It follows that the Bill of Complaint is sufficient and the decree properly in accordance therewith.

Respectfully submitted,

JOHN McCOURT,

United States Attorney for the
District of Oregon.

STATE OF OREGON, }
County of Multnomah. } ss.

Due and legal service of the foregoing brief is hereby accepted and the receipt of a true copy thereof is hereby acknowledged.

.....

Attorneys for Plaintiff in Error.

STATE OF OREGON, }
County of Multnomah. } ss.

I, John McCourt, hereby certify that I am United States Attorney for the District of Oregon and attorney for defendant in error in the within entitled action; that I prepared the foregoing copy of brief and have carefully compared the same with the original thereof and it is a true and correct transcript of the said original and the whole thereof.

.....

No. 1874

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. H. STEWART (Defendant),

Plaintiff in Error,

vs.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY COMPANY (A Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION COMPANY (A Corporation), (Plaintiff),

Defendant in Error,

TRANSCRIPT OF RECORD

Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division

FILMER BROS. CO. PRINT., 330 JACKSON ST., S. F., CAL.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Names and Addresses of Attorneys of Record.

EDMUND SMITH and E. E. RITCHIE, Valdez, Alaska,

Attorneys for O. G. Laberee, Receiver of the Alaska Central Railway Co., a Corporation, and Receiver of the Tanana Railway Construction Co., a Corporation, Plaintiff and Appellee.

BROWN & LYONS, Valdez, Alaska,

Attorneys for F. H. Stewart, Defendant and Appellant.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Amended Complaint.

The plaintiff in this his amended complaint, served and filed by leave of Court first had and obtained, complains and alleges as a first cause of action:

1. That the Alaska Central Railway Company is a corporation duly organized and existing under the laws of the State of Washington and doing business in the Territory of Alaska.

2. That the Tanana Railway Construction Company is a corporation duly organized and existing under the laws of the State of Washington and doing business in the Territory of Alaska.

3. That said Tanana Railway Construction Co. was at all times a mere agent of the said Alaska Central Railway Co., and that all moneys, property, assets and credits of all and every kind and character of said Tanana Railway Construction Co. were at all times the money, property and credit of said Alaska Central Railway Co., and said Tanana Railway Construction Co. had no other funds, moneys, assets, credits or property except the funds, moneys, assets, credits and property of the said Alaska Central Railway Co.

4. That on the 23d day of October, 1908, the plaintiff, O. G. Laberee, was duly appointed by the District Court of the Territory of Alaska, Third Judicial Division, Receiver of the said Alaska Central Railway Co., and also Receiver of the said Tanana Railway Construction Co., and that upon the same day he filed his bond as such receiver in the sum required by the Court, and filed his oath of office as such receiver, and was at the commencement of this action the duly appointed, qualified and acting receiver of said Alaska Central Railway Co. and said Tanana Railway Construction Co.

5. That by said order appointing this plaintiff receiver as aforesaid, plaintiff was given the custody and possession and legal control as such receiver of all the property of every description of the said Alaska Central Railway Co. and of the said Tanana

Railway Construction Co., including the moneys, credits and choses in action, with authority to sue for the recovery of the same.

6. That from about the 1st day of February, 1905, until about the 1st day of January, 1908, the defendant, F. H. Stewart, was the assistant treasurer of the said Alaska Central Railway Co. and was the treasurer of the said Tanana Railway Construction Co., with his office at Seward, Alaska, in which official capacities he was charged with the custody and disbursements of all the funds of said corporations deposited and disbursed at Seward, or along the line of the Alaska Central Railway Co., during the period of his incumbency of said positions of assistant treasurer and treasurer respectively.

7. That during the period of defendant's said incumbency as assistant treasurer and treasurer, as aforesaid, of said corporations, he received into his custody large sums of money belonging to said Alaska Central Railway Co., but received the same as treasurer of the said Tanana Railway Construction Co., which said money was the property of the said Alaska Central Railway Co. That a large part of said money so received and which came into his hands as aforesaid, the said defendant has failed to account for the sum of $11,608.34, and that on the 31st day of October, 1907, the said defendant entered upon the books of the said Tanana Railway Construction Co., a statement of said account, and admitted the same, and designated the same on the books of the said Tanana Railway Construction Co., as "F. H. Stewart, Adjustment Acct. No. 1." which said

account shows a balance due on said account of said defendant of the sum of $11,608.34, no part of which has been paid and the same is long past due.

8. That no part of said sum of $11,608.34 has been paid and there is now due thereon the said sum with interest at 8% per annum from October 31st, 1907.

9. That prior to the commencement of this action demand was duly made upon said F. H. Stewart for the said sum of $11,608.34.

That for a second cause of action the plaintiff alleges:

1. Plaintiff repeats the first six paragraphs of the first cause of action set out herein by reference thereto, and makes the same a part of said second cause of action the same as if said paragraphs were set out at length herein.

2. That during the period of defendant's said incumbency as assistant treasurer and treasurer as aforesaid, of said corporations, he received into his custody large sums of money belonging to said Alaska Central Railway Co., and failed to account and pay over the same to, for or on the account of the said Alaska Central Railway Co., or said Tanana Railway Construction Co., a large part of the moneys so received, to wit: The sum of $11,188.25. That on the 10th day of September, 1907, the said defendant, while acting as treasurer as aforesaid, and in the books of the said Tanana Railway Construction Co., kept by said defendant, entered and stated an account in the said sum of $11,188.25 under the title of "F. H. Stewart Adjustment Acct. No. 2," and said defendant there stated and admitted that the said sum

of money was in his hands, the same being as aforesaid the property of the Alaska Central Railway Co.

3. That no part of said sum of $11,188.25 has been paid, and the same is now due with interest thereon at 8% per annum from the 30th day of September, 1907.

4. That prior to the commencement of this action a demand was duly made upon said defendant for said sum of $11,188.25, and the said defendant failed and neglected to pay over and account for the same.

5. That all of said moneys set forth in the first and second causes of action herein was at all of said times the money and property of the said Alaska Central Railway Co.

Wherefore, plaintiff prays the Court for judgment against the said defendant for the sum of $11,608.34 with interest thereon from the 31st day of October, 1907, and the sum of $11,188.25 with interest thereon from the 10th day of September, 1907, besides the costs and disbursements of this action.

E. E. RITCHIE,
EDMUND SMITH,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

E. E. Ritchie, being duly sworn, deposes and says:

I am one of the attorneys for plaintiff in the above-entitled action. That I have read the foregoing amended complaint and understand the contents thereof, and the same is true to the best of my knowledge, information and belief. That the rea-

son this verification is made by affiant and not by the plaintiff is that plaintiff at present is not within the Territory of Alaska, being the place where this affiant resides and has his office. Affiant has knowledge of the above facts through conversations had with said receiver and the examination of the books of the Alaska Central Railway Co., and the Tanana Railway Construction Co.

E. E. RITCHIE.

Subscribed and sworn to before me this 10th day of December, 1909.

[Seal] EDMUND SMITH,
Notary Public.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Plaintiff, vs. F. H. Stewart, Defendant. Amended Complaint. Filed Dec. 11, 1909. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. Edmund Smith and E. E. Ritchie, Attorneys for Plaintiff.

In the District Court for the District of Alaska, Third Division.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),
Plaintiff,

vs.

F. H. STEWART,
Defendant.

Answer.

The defendant for answer to the plaintiff's amended complaint herein, says and alleges:

First. Defendant admits each and every allegation and averment in said amended complaint, except that he denies that he ever failed to account for any money or thing whatsoever to either the said Alaska Central Railway Company or said Tanana Railway Construction Company, or said receiver, and alleges the fact to be that he accounted for and reported to each of said companies, to and through the proper officers of each of said companies, that he was indebted to said companies in about the sum mentioned in said amended complaint, and gave his promissory notes therefor, which said promissory notes were before the commencement of this action, fully paid, satisfied and cancelled. And this defendant denies that he is indebted to either said Alaska Central Railway Company or to said Tanana Railway Construction Company, or to said receiver, O. G. Laberee in any sum or on any account whatsoever.

Wherefore defendant prays that plaintiff's said complaint be dismissed upon its merits, and that he recover his costs and disbursements herein.

BROWN & LYONS,
Attorneys for Defendant.

United States of America,
Territory of Alaska,—ss.

I, F. M. Brown, being first duly sworn depose and say: That I am one of the attorneys for defend-

ant named in the above-entitled action, and that the foregoing answer is true as I verily believe. That defendant is not within the District of Alaska.

F. M. BROWN.

Subscribed and sworn to before me this 29th day of March, A. D. 1910.

[Seal] JOHN LYONS,
Notary Public for Alaska.

United States of America,
Territory of Alaska,—ss.

Due and legal service is hereby accepted, this 29th day of March, A. D. 1910, by receiving a copy thereof, duly certified to by F. M. Brown one of the attorneys for the defendant.

EDMUND SMITH,
Attorneys for Plaintiff.

[Endorsed]: No. 377. In the District Court for Territory of Alaska, Division No. 3, at Valdez. O. G. Laberee, Receiver, Plaintiff, vs. F. H. Stewart, Defendant. Original. Answer. Brown & Lyons, Attorneys for Defendant, Valdez, Alaska. Filed in the District Court, Territory of Alaska, Third Division. Mar. 29, 1910. Clerk. By V. A. Paine, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Reply.

Comes now the above-named plaintiff and in reply to the new matter and affirmative defense set forth in defendant's answer herein, plaintiff denies and alleges:

1st. Plaintiff specifically denies that the sum of money mentioned and described in plaintiff's complaint or any part thereof has been paid.

Wherefore, plaintiff demands judgment as in his complaint herein.

E. E. RITCHIE,
EDMUND SMITH,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Edmund Smith, being duly sworn, says: I am one of the attorneys for plaintiff in the above-entitled action. I have read the foregoing reply and understand the same, and it is true to the best of my knowl-

edge, information and belief. That the reason this reply is verified by this affiant and not by the said plaintiff is that the said plaintiff is not now within the Territory of Alaska.

EDMUND SMITH.

Subscribed and sworn to before me this 4th day of April, 1910.

[Seal] C. E. BUNNELL,
Notary Public.

Service admitted this 5th day of April, A. D. 1910.

BROWN & LYONS,
Attorneys for Defendants.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Receiver, Plaintiff, vs. F. H. Stewart, Defendant. Reply. Filed Apr. 4, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. Edmund Smith, E. E. Ritchie, Attorneys for Plaintiff.

[Defendant's Exhibit No. 1.]

(Defendant's Exhibit No. 1, being pages 29 and 31 of the Minute-book of the Tanana Railway Construction Co.)

Regular meeting of the Board of Trustees of the Tanana Railway Construction Company held at the office of the Company, room 502 of the Burke Building, Second Avenue, Seattle, Washington, on Saturday, the third day of April, A. D. 1909, at one o'clock in the afternoon.

In conformity with the requirements of the by-laws, the regular April meeting of the Board of Trustees was held at the above time and place.

Present: Walter S. Brown, and Walter S. Brown, George A. Brown and Charles R. Barney, Trustees, being a majority of the four trustees of said Company.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That

WHEREAS, on the 21st day of December, 1907, F. H. Stewart gave to said Tanana Railway Construction Company his promissory notes in writing, one of which was in words and figures as follows, to wit:

"$11,188.25 Montreal 21st December, 1907.

On demand after date I promise to pay to the Tanana Railway Construction Company the sum of Eleven Thousand One Hundred and eighty-eight and 25/100 Dollars, with interest at the rate of six per cent (6%) per annum; this amount includes note for Eight Thousand Dollars ($8,000) in favor of the Alaska Central Railway Co. and which was used as an I. O. U. memo to balance cash accounts at Seward.

F. H. STEWART."

—and the other of which was in words and figures as follows, to wit:

"$11,608.34. Montreal, 21st December, 1907.

On demand after date, I promise to pay to the Tanana Railway Construction Company the sum of Eleven Thousand Six Hundred and Eight and 34/100 Dollars with interest at the rate of six per cent (6%) per annum.

F. H. STEWART."

And WHEREAS, in accordance with the wishes and instructions of the stockholders of this Company said notes have been canceled and delivered up to said Stewart by A. C. Frost on payment of Six Thousand Dollars in full settlement and payment of said indebtedness, and said Frost has expended said Six Thousand Dollars for and on behalf of said Tanana Railway Construction Company in looking after and protecting said Company's interests.

Said action of A. C. Frost in delivering up and cancelling said notes and in accepting said $6,000 in full settlement and payment of said indebtedness and in expending said $6,000 for and on behalf of said Tanana Railway Construction Company, be and it hereby is in all things approved, ratified and confirmed.

There being no further business, the meeting was duly adjourned to meet at the same place on Saturday, the 10th day of April, A. D. 1909, at one o'clock in the afternoon.

GEO. A. BROWN,
W. S. BROWN,
C. R. BARNEY,
Trustees.

Attest:
W. S. BROWN,
Secretary.

Defendant's Exhibit No. 2.

A. C. Frost Company,
206 LaSalle Street
Chicago.

March 25, 1909.

F. H. Stewart, Esq.,
Hotel Victoria,
New York.

My Dear Stewart: I acknowledge the receipt of your letter of the 23rd with enclosures, for which I thank you.

Boland asked me when here this week regarding your obligations to the Construction Company. I told him that you had settled with me for the same. He said that the Sovereign Bank people will regret to learn that, for the reason that they "preferred the claim to any settlement."

You will be glad to learn that a final agreement was reached here last Tuesday, which provides for an immediate foreclosure decree, and the issuance of $250,000 of Receiver's Certificates to complete the road to mile 72.

In the interests of an early completion of the Railway, great concessions were made in order to effect a settlement. I deemed it of greater importance that an immediate foreclosure be had and the work on the road resumed as soon as possible than continue litigation indefinitely, and for that reason I made great sacrifice in effecting the settlement.

Very truly yours,

A. C. FROST.

Dict. A. C. F.

Defendant's Exhibit No. 3.

$11,608.34 Montreal, 21st December, 1907.

On demand after date, I promise to pay to the Tanana Railway Construction Company the sum of Eleven Thousand Six Hundred and Eight and 34/100 Dollars with interest at the rate of six per cent (6%) per annum.

F. H. STEWART.

Canceled.
March 1/09.

Defendant's Exhibit No. 4.

$11.188.25 Montreal 21st December, 1907.

On demand after date I promise to pay to the Tanana Railway Construction Company the sum of Eleven Thousand One Hundred and eighty-eight and 25/100 Dollars, with interest at the rate of six per cent (6%) per annum, this amount includes note for Eight Thousand Dollars ($8,000) in favor of the Alaska Central Railway Co. and which was used as an I. O. U. memo to balance cash accounts at Seward.

F. H. STEWART.

Canceled.
March 1/09.

[Plaintiff's Exhibit: Certain Pages of the Minute-book of the Tanana Railway Construction Co.]

(Plaintiff's Exhibit: Page 7 of the Minute-book of the Tanana Railway Construction Co.)

Special meeting of the stockholders of the Tanana Railway Construction Company held at the office of the Company at Room 502 of the Burke Building,

Second Avenue, Seattle, Washington, on the 15th day of May, 1908, at two o'clock in the afternoon.

Pursuant to notice duly given in accordance with the by-laws a special meeting of the stockholders of the Company was held at the above time and place.

Present: George E. Winter, Secretary of said Company, and the following stockholders:

Lloyd Harris, holding 500 shares of the capital stock of said Company, by his proxy, James A. Haight, and

George A. Ball, holding 500 shares of the capital stock of said Company, being present by his proxy, James A. Haight,

—said stockholders being all the stockholders of said Company, and said stock represented being all the capital stock of said Company.

In the absence of the President and Vice-president the Secretary, George E. Winter, presided at the meeting.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That the sale and transfer on the 29th day of December, A. D. 1904, by John E. Ballaine, Oscar G. Laberee, George Turner, James A. Haight and Frank Thompson of all their shares of capital stock of the Tanana Railway Construction Company, being all the capital stock of said Company, to Albert C. Frost, of Chicago, Illinois, and Henry C. Osborne of Toronto, Canada, in and by the written contract dated said 29th day of December, A. D. 1904, by and between said Ballaine, Laberee, Turner, Haight and Thompson, parties of the first

part, and said Frost and Osborne, parties of the second part, be and the same hereby is in all things ratified and confirmed and that the consent of all the stockholders of said Tanana Railway Construction Company to said sale and transfer is hereby given.

On motion duly seconded the following resolution (Plaintiff's Exhibit: Page 9 of the Minute-book of the Tanana Railway Construction Co.) was unanimously adopted:

RESOLVED: That the sale and transfer on the 12th day of September, 1907, by A. C. Frost and H. C. Osborne of all their shares of the capital stock of the Tanana Railway Construction Company, being all of the capital stock of said Company, to George A. Ball of Muncie, Indiana, and to Lloyd Harris of Brantford, Ontario, 500 shares to each, in and by the written assignment dated said September 12, 1907, and signed by said A. C. Frost and H. C. Osborne, be and the same hereby is in all things ratified and confirmed and the consent of all the stockholders of the Tanana Railway Construction Company to said sale and transfer is hereby given.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That Article IX of the by-laws of said Company be and it hereby is amended to read as follows:

Article IX.

The capital stock of said corporation shall consist of one thousand (1000) shares of the par value of One Hundred Dollars ($100) each, none of which

shall be issued until fully paid for, and subscriptions therefor shall be due at once on being made. Said stock and shares shall be transferable only on the books of said Company. The certificate of said stock shall be in words and figures as follows:

"INCORPORATED UNDER THE LAWS OF THE STATE OF WASHINGTON.

No. ——— Shares ———

TANANA RAILWAY CONSTRUCTION COMPANY.

Capital Stock $100,000.

This certifies that ———— is the owner of ——— shares of One Hundred Dollars ($100.00) each of the capital stock of

TANANA RAILWAY CONSTRUCTION COMPANY,

transferable only on the books of the corporation by the holder hereof in person or by attorney, upon surrender of this certificate properly endorsed.

(Plaintiff's Exhibit: Page 11 of the Minute-book of the Tanana Railway Construction Co.)

IN WITNESS WHEREOF the said corporation has caused this certificate to be signed by its duly authorized officers, and to be sealed with the seal of the corporation this —— day of ———— A. D. 190——.

(Seal of Tanana Railway Construction Company.)

————————,

Attest: President.

————————,

Secretary.

Shares, $100 each."

On motion duly seconded it was unanimously resolved as follows:

RESOLVED: That all trusteeships of said Company be and the same hereby are declared and made vacant.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That assent of all the stockholders of the Tanana Railway Construction Company be and it hereby is given to the transfer by Lloyd Harris of one share of the capital stock of said Company to Walter S. Brown; one share to George A. Brown; one share to Charles R. Barney; one share to Sydney Livesey.

Thereupon a transfer was made from Lloyd Harris of one share of the capital stock of the Tanana Railway Construction Company to Walter S. Brown; of one share of said stock to George A. Brown; of one share of said stock to Charles R. Barney; of one share of said stock to Sydney Livesey, and said Walter S. Brown, George A. Brown, Charles R. Barney and Sydney Livesey, being present as stockholders as aforesaid, participated in the further proceedings of said meeting.

On motion duly seconded the secretary of the Company was unanimously instructed to cast the vote of all the stockholders for the following trustees

(Plaintiff's Exhibit: Page 13 of the Minute-book of the Tanana Railway Construction Co.)

to fill the vacancies heretofore made and declared, viz.: Walter S. Brown, George A. Brown, Charles

R. Barney, Sydney Livesey, which was done, and Walter S. Brown, George A. Brown, Charles R. Barney and Sydney Livesey were duly declared elected trustees of said Company.

On motion the meeting adjourned to meet at the same place on May 15th, 1908, at 2:30 o'clock in the afternoon.

A true record:

LLOYD HARRIS,
By JAMES A. HAIGHT,
Attorney in Fact.
GEORGE A. BALL,
By JAMES A. HAIGHT,
Atty. in Fact.
WALTER S. BROWN.
GEO. A. BROWN.
CHARLES R. BARNEY.
SYDNEY LIVESEY.

Being all the stockholders of said Company.

Attest:

GEORGE E. WINTER,
Secretary.

(Plaintiff's Exhibit: Page 19 of the Minute-book of the Tanana Railway Construction Co.)

Special meeting of the Board of Trustees of the Tanana Railway Construction Company held at the office of the Company at 502 Burke Building, Second Avenue, Seattle, Washington, on the 15th day of May, A. D. 1908, at fifteen minutes past two o'clock in the afternoon.

Pursuant to notice duly given in accordance with the by-laws a special meeting of the Board of Trustees was held at the above time and place.

Present: George E. Winter, Secretary, and Walter S. Brown, George A. Brown, Charles R. Barney and Sydney Livesey, being all the trustees of the Company.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That Article IX of the by-laws of said Company be and it hereby is amended to read as follows:

ARTICLE IX.

The capital stock of said corporation shall consist of one thousand (1000) shares of the par value of One Hundred Dollars ($100.) each, none of which shall be issued until fully paid for, and subscriptions therefor shall be due at once on being made. Said stock and shares shall be transferable only on the books of said Company. The certificate of said stock shall be in words and figures as follows:

"INCORPORATED UNDER THE LAWS OF THE STATE OF WASHINGTON.

No. ——— Shares ———

TANANA RAILWAY CONSTRUCTION COMPANY.

Capital Stock $100,000.

This certifies that ———— is the owner of ——— shares of One Hundred Dollars ($100) each of the capital stock of

(Plaintiff's Exhibit: Page 21 of the Minute-book of the Tanana Railway Construction Co.)

TANANA RAILWAY CONSTRUCTION COMPANY,

transferable only on the books of the corporation by

the holder hereof in person or by attorney, upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF the said corporation has caused this certificate to be signed by its duly authorized officers, and to be sealed with the seal of the corporation this —— day of ——— A. D. 190——.

———————,

President.

(Seal of Tanana Railway Construction Company.)

Attest:

———————,

Secretary.

Shares, $100 each."

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That the offices of President, Vice-President, Secretary and Treasurer, be and they hereby are declared and made vacant, and the persons holding such offices respectively be and they hereby are removed from the offices held by them respectively.

Sydney Livesey was thereupon duly elected chairman of the meeting. Walter S. Brown was duly elected Secretary of the meeting.

On motion duly seconded it was unanimously voted that the Secretary of the meeting be and he

hereby is instructed to cast the vote of the meeting for Frank Brown as President of the Tanana Railway Construction Company, which was done, and Frank Brown was duly declared elected President of the Tanana Railway Construction Company.

On motion duly seconded it was unanimously voted that the Secretary be and he hereby is instructed to case the vote of the meeting for

(Plaintiff's Exhibit: Page 23 of the Minute-book of the Tanana Railway Construction Co.)

Walter S. Brown as Secretary of the Tanana Railway Construction Company, which was done, and Walter S. Brown was duly declared elected Secretary of the Tanana Railway Construction Company.

On motion duly seconded it was unanimously voted that the Secretary be and he hereby is instructed to cast the vote of the meeting for Frank Brown as Treasurer of said Company, which was done, and Frank Brown was duly declared elected Treasurer of the Tanana Railway Construction Company.

On motion duly seconded it was unanimously voted that the Secretary be and he hereby is instructed to cast the vote of the meeting for Sydney Livesey as Vice-President of the Tanana Railway Construction Company, which was done, and Sydney Livesey was duly declared elected Vice-President of the Tanana Railway Construction Company.

There being no further business, the meeting duly adjourned.

A true record:

SIDNEY LIVESEY,
Chairman and Vice-President.
WALTER S. BROWN,
CHARLES R. BARNEY,
GEO. A. BROWN,
Trustees.

GEORGE E. WINTER.
Attest:
WALTER S. BROWN.

(Plaintiff's Exhibit: Page 25 of the Minute-book of the Tanana Railway Construction Co.)

Adjourned special meeting of the stockholders of the Tanana Railway Construction Company held at the office of the Company at Room 502 of the Burke Bldg., Second Avenue, Seattle, Washington, on the 15th day of May, A. D. 1908, at 2:30 o'clock in the afternoon.

Pursuant to adjournment, the adjourned special meeting of the stockholders of the Tanana Railway Construction Company was held at the above time and place.

Present:

Walter S. Brown, holding one share of the capital stock of said Company;

George A. Brown, holding one share of the capital stock of said company;

Charles R. Barney, holding one share of the capital stock of said Company;

Sidney Livesey, holding one share of the capital stock of said Company;

Lloyd Harris, holding 496 shares of the capital stock of said Company, by James A. Haight, his attorney;

George A. Ball, holding 500 shares of the capital stock of said Company, by James A. Haight, his attorney.

The proceedings of the meeting of the stockholders of said Company held on the 15th day of May, 1908, at two o'clock in the afternoon of said day, were duly read and approved.

The proceedings of the meeting of the Board of Trustees of the Tanana Railway Construction Company held on the 15th day of May, A. D. 1908, at fifteen minutes after two o'clock in the afternoon, were duly read and approved.

On motion duly seconded the following resolution was unanimously adopted:

RESOLVED: That all the proceedings of the meeting of the Board of Trustees of the Tanana Railway Construction Company held on the 15th day of May,

(Plaintiff's Exhibit: Page 27 of the Minute-book of the Tanana Railway Construction Co.)

A. D. 1908, at fifteen minutes after two o'clock in the afternoon, be and the same hereby are in all things ratified and confirmed.

There being no further business, the meeting duly adjourned.

A true record:

SIDNEY LIVESEY,
Vice-President.
WALTER S. BROWN,
CHARLES R. BARNEY,
GEO. A. BROWN,
LLOYD HARRIS,
By JAMES A. HAIGHT,
His Attorney in Fact.
GEORGE A. BALL,
By JAMES A. HAIGHT,
His Attorney in Fact,
Stockholders.

Attest:

WALTER S. BROWN,
Secretary.

(Plaintiff's Exhibit: Page 33 of the Minute-book of the Tanana Railway Construction Co.)

SPECIAL MEETING of the Trustees of the TANANA RAILWAY CONSTRUCTION COMPANY, held at the office of the Company at Room 502 in the Burke Building, Second Avenue, Seattle, Washington, on Wednesday, the 7th day of April, A. D. 1909, at thirty minutes past twelve o'clock, in the afternoon.

Pursuant to notice duly given by the Secretary in accordance with the by-laws, a special meeting of the Board of Trustees of the Tanana Railway Construction Company was held at the above time and place.

Present: Walter S. Brown, George A. Brown and

Charles R. Barney, being all the trustees, Sydney Livesey, the remaining trustee, having removed to North Yakima, Washington, and having filed his resignation as trustee; also Walter S. Brown, Secretary of the Company.

On motion, the resignation of Sydney Livesey as trustee was duly submitted to the Board, and on motion duly seconded it was unanimously voted that said resignation be accepted and the trusteeship hitherto held by him was declared to be vacant.

On motion it was unanimously voted that the vacancy in the Board of Trustees caused by the resignation of Sydney Livesey be filled by the election of George Turner as said Trustee, and that the Secretary be instructed to cast the vote of the Board for said George Turner as said trustee, which was done, and said George Turner was duly declared elected trustee of this Company.

Said George Turner, being present, duly qualified
(Plaintiff's Exhibit: Page 35 of the Minute-book of the Tanana Railway Construction Co.)
as trustee of the Company and participated in the further proceedings of the Board.

The resignation of Frank Brown as President and Treasurer of the Company was submitted to the Board. On motion duly seconded it was unanimously voted that said resignation be unanimously accepted.

On motion duly seconded it was unanimously voted that the vacancy in the office of the President caused by the resignation of Frank Brown be filled by the election of W. R. McDonald as President of the

Company, and that the Secretary of the Company be instructed to cast the vote of the Board for said W. R. McDonald as such President, which was done, and said Ralph McDonald was duly declared elected president of the Company.

Said McDonald thereupon duly entered upon the performance of his duties as President of the Company.

On motion duly seconded it was unanimously resolved that the vacancy caused by the resignation of Frank Brown as Treasurer be filled by said Board by the election of James A. Haight as such treasurer, and that the Secretary be instructed to cast the vote of the Board for said James A. Haight as such Treasurer, which was done, and said James A. Haight was duly declared elected treasurer of the Company.

The resignation of Sidney Livesey as Vice-President of the Company was then submitted to the Board. On motion duly seconded it was unanimously voted that said resignation be accepted.

On motion duly seconded it was unanimously voted that Guy Sanborne be elected to fill the vacancy in the office of Vice-President caused by the resignation of Sidney Livesey, and that the Secretary be directed to cast the vote of the Board for said Guy Sanborne as such Vice-President, which was done, and said Guy Sanborne was duly declared elected Vice-President of the Company.

The resignation of Walter S. Brown as Secretary

(Plaintiff's Exhibit: Page 37 of the Minute-book of the Tanana Railway Construction Co.)

of the Company was submitted to the Board, and on motion duly seconded it was unanimously voted that said resignation be accepted.

On motion duly seconded it was unanimously voted that James A. Haight be elected by the Board to fill the vacancy caused by the resignation of Walter S. Brown as Secretary of the Company and that the vote of the Board be cast for James A. Haight as such Secretary, which was done, and said James A. Haight thereupon entered upon the performance of his duties as Secretary.

The resignation of Walter S. Brown as Trustee of the Company was submitted to the Board, and on motion duly seconded it was unanimously voted that said resignation be accepted.

On motion duly seconded it was unanimously voted that W. R. McDonald be elected to fill the vacancy in the office of trustee caused by the resignation of Walter S. Brown, and that the Secretary be instructed to cast the vote of the Board for said W. R. McDonald as such trustee, which was done, and said W. R. McDonald was duly declared elected trustee of the Company.

Said W. R. McDonald, being present, duly qualified as trustee and participated in the further proceedings of the Board.

The resignation of George A. Brown as trustee of the Company, to take effect April 8, 1909, was submitted to the Board, and on motion duly seconded it

was unanimously voted that said resignation be accepted.

On motion duly seconded it was unanimously voted that Guy Sanborne be elected to fill the vacancy in the office of trustee caused by the resignation of George A. Brown, and that the Secretary be in-

(Plaintiff's Exhibit: Page 39 of the Minute-book of the Tanana Railway Construction Co.)

structed to cast the vote of the Board for said Guy Sanborne as such trustee, which was done, and said Guy Sanborne was duly declared elected Trustee of the Company.

The resignation of Charles R. Barney as Trustee of the Company to take effect April 8, 1909, was submitted to the Board, and on motion duly seconded it was unanimously voted that said resignation be accepted.

On motion duly seconded it was unanimously voted that J. C. Williams be elected to fill the vacancy in the office of trustee caused by the resignation of Charles R. Barney, and that the Secretary be instructed to case the vote of the Board for said J. C. Williams as such trustee, which was done, and said J. C. Williams was duly declared elected Trustee of the Company.

There being no further business, the meeting adjourned sine die.

W. S. BROWN,
GEO. A. BROWN,
CHARLES R. BARNEY,
GEORGE TURNER,
W. R. McDONALD,
Trustees.

W. S. BROWN,
Secretary.
JAMES A. HAIGHT,
Secretary.

[Plaintiff's Exhibit No. 5.]

In the District Court for the Territory of Alaska, Third Division.

No. 343.

THE TRUSTS & GUARANTEE COMPANY, LIMITED,
Plaintiff,

vs.

THE ALASKA CENTRAL RAILWAY COMPANY, THE TANANA RAILWAY CONSTRUCTION COMPANY, THE CENTRAL TRUST COMPANY OF ILLINOIS, BALL BROS. MANUFACTURING COMPANY, A. C. FROST, H. C. OSBORNE, JOHN E. BALLAINE,
Defendants.

Order Appointing Receivers [etc., in Case No. 343].

This cause coming on to be heard upon the verified complaint of the plaintiff, together with evidence heard in open court and stipulations made, J. M. Lathrop, Esquire, and F. H. Graves, Esquire, appearing for the plaintiff, and F. M. Brown, Esquire, and James A. Haight, Esquire, appearing for the defendants, The Alaska Central Railway Company and the Tanana Railway Construction Company, and it appearing to the Court that the other defendants were not material to be represented upon the hearing of this motion, and counsel for the defendant The Tanana Railway Construction Company objecting to the jurisdiction of the Court over that company and its property and objecting to an order appointing a receiver over that company, or any of its property, and the Court being fully advised in the premises, now, on motion of counsel for the plaintiff,

IT IS ORDERED by the Court that O. G. Laberee and John A. Goodwin, be, and hereby are appointed receivers of this Court of all and singular the property, assets, rights and franchises of the Alaska Central Railway Company described in the complaint herein, and of the Tanana Railway Construction Company described in the complaint herein, situated in the Territory of Alaska, including all the railroad tracks, terminal facilities, real estate, warehouses, offices, stations, and all other buildings and property of every kind, owned, held, possessed or controlled by said companies, or either of them, in said Terri-

tory, together with all other property in connection therewith, and all moneys, choses, credits, bonds, stocks, leasehold interests, contracts, and other assets of every kind, and timbers, equipment, rails, ties, and all other property real, personal and mixed held or possessed by them, or either of them, or hereafter acquired, or to be acquired or obtained by them, or either of them. To have and to hold the same as the officers of and under the orders and directions of the Court.

The said receivers are hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found in this Territory, and to hold the same, and to preserve the same free from injury and deterioration as far as possible, and to discharge all the duties obligatory upon said companies, or either of them, so far forth as they may from time to time be ordered and directed by this Court.

And the said Alaska Central Railway Company and the Tanana Railway Construction Company, and each of them, and the directors, agents and employees of them and each of them, are hereby required and commanded forthwith to turn over and deliver to such receivers or their duly constituted representatives, any and all books of account, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, money or other property in his or their hands, or under his or their control, and they are hereby commanded and required to obey and conform to such orders as may be given them from time to time by the said receivers, or their duly constituted

representatives in conducting the business of the said defendants, and in discharging their duty as receivers, and they, and each of them, and the defendants in this cause, and each of them, are hereby enjoined and restrained from interfering in any way whatever with the possession or management of any part of the business or property over which said receivers are so appointed or from in any way preventing or seeking to prevent the discharge of their duties as such receivers; and said receivers are hereby fully authorized and empowered to fix the compensation of all such agents, employees and counsel as may be required for the proper discharge of the duties of this trust.

Said receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby vested in them, and likewise to defend all actions instituted against them as receivers, and, also, to appear and conduct the prosecution or defense of any and all suits or actions pending against said companies, or either of them, the prosecution or defense of which will, in the judgment of said receivers, be necessary and proper for the protection of the property and rights placed in their charge, and for the interest of the creditors and stockholders of said companies.

IT IS FURTHER ORDERED that said receivers shall have all such additional power and authority as receivers as is given by the statutes of the Territory of Alaska, and all such power and authority as is usual in the appointment of a receiver in such cases

and under such circumstances, for the protection of the said property and the preservation thereof, without any special order being made by this Court in that behalf.

It appearing to the Court that in a suit now pending in this court, wherein defendant in this cause, John E. Ballaine, was plaintiff, and defendants the Alaska Central Railway Company, The Tanana Railway Construction Company, A. C. Frost, and H. C. Osborne were defendants, this Court did make an order on the 19th day of May, 1908, at Fairbanks in this Territory, appointing one John A. Goodwin to be receiver of the property of the defendant corporations aforesaid, and that the property of said corporations, pursuant to said order, was turned over to said Goodwin as such receiver, and is now in his possession and under his control,

IT IS FURTHER ORDERED AND DIRECTED that the said John A. Goodwin, as receiver in said cause, turn over and deliver to the receivers appointed by this order all property of whatsoever kind, character, nature or description which has come into his hands and of which he has now control or possession by virtue of such receivership; and that this order, and the receivership hereby created shall, and is hereby ordered and directed to supersede and take the place of the said receivership of the said John A. Goodwin; and it is further ordered and directed that the receivers appointed by this order shall take the property, and the possession thereof, and shall hold and administer the same, and every part thereof, subject to such order as this

Court may hereafter lawfully make touching the expenses of the said receivership of the said John A. Goodwin and subject to any lien for the charges of said receivership of the said John A. Goodwin as and to the extent the same may hereafter be declared and allowed by the Court.

IT IS FURTHER ORDERED AND DIRECTED that the Court retains the old receivership cause for the purpose of settling accounts and of determining against what parties and what property the charges of said receivership shall be assessed.

Each of the receivers hereby appointed is required to give bond in the sum of Fifty Thousand ($50,000) Dollars, with security satisfactory to this Court, for the faithful discharge of his duties. The receivers are required to make and file full reports in this court semi-annually, and the Court reserves the right, by orders hereinafter to be made, to protect and control all payments and all claims, and in all respects to regulate and to control the conduct of said receivers.

IT IS FURTHER ORDERED AND DIRECTED by the Court that upon the death, resignation or other disqualification to act of either of the receivers hereby appointed, all the powers and duties hereby conferred upon said receivers jointly shall be exercised and discharged by the survivor until such time as the Court shall in that behalf make further or other orders.

TO ALL OF WHICH, and every part thereof, the defendant, The Tanana Railway Construction Com-

pany, excepts, and the exception in open court is hereby allowed.

DONE IN OPEN COURT at Valdez, Alaska, this 23d day of October, A. D. 1908.

SILAS H. REID,
District Judge.

Entered in Court Journal No. 5, page 43.

[Endorsed]: Order Appointing Receiver. 377. Pltf. X. 5.

In the District Court for the Territory of Alaska, Third Division.

377.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),
Plaintiff,

vs.

F. H. STEWART,
Defendant.

Findings of Fact and Conclusions of Law.

This matter coming on to be heard on plaintiff's amended complaint and defendant's answer thereto and plaintiff's reply to the affirmative matters set forth in said answer, Edmund Smith and E. E. Ritchie, appearing on behalf of the plaintiff, and Brown & Lyons appearing for the defendant, and a jury having been expressly waived herein by each of the parties hereto, and the cause having been tried to the Court without a jury, and the Court having

made, entered and filed its written opinion herein, of date April 16, 1910, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

1st. That the Alaska Central Railway Co. is a corporation duly organized and existing under the laws of the State of Washington, and doing business in the Territory of Alaska.

2nd. That the Tanana Railway Construction Co. is a corporation duly organized and existing under the laws of the State of Washington, and doing business in the Territory of Alaska.

3rd. That the said Tanana Railway Construction Co. was at all times mentioned in the amended complaint a mere agent of the said Alaska Central Railway Company, and that all moneys, property, assets and credits of all and every kind and character of the said Tanana Railway Construction Co. were at all times the money, property and credit of the said Alaska Central Railway Co., and that the said Tanana Railway Construction Co. had no other funds, moneys, assets, credits or property except the funds, moneys, assets, credits and property of the said Alaska Central Railway Co.

4th. That on the 23d day of October, 1908, the plaintiff, O. G. Laberee, was duly appointed by the District Court of the Territory of Alaska, Third Judicial Division, Receiver of the said Alaska Central Railway Co., and also Receiver of the said Tanana Railway Construction Co., and that upon the same day he filed his bond as such receiver in the sum required by the Court, and filed his oath of office as such

receiver, and was at the commencement of this action the duly appointed, qualified and acting Receiver of said Alaska Central Railway Co. and said Tanana Railway Construction Co.; that all of the officers and agents of the said Alaska Central Railway Co. and the said Tanana Railway Construction Co., had notice of the appointment of said receiver, and each of said corporations, by their counsel, were present and had entered a general appearance in said cause of action wherein the said receiver was appointed.

5th. That by said order appointing this plaintiff receiver as aforesaid, plaintiff was given the custody, possession and legal control as such receiver of all the property of every description of the said Alaska Central Railway Co. and of the said Tanana Railway Construction Co., including moneys, credits and choses in action with authority to sue for and recover the same.

6th. That from about the 1st day of February, 1905, until about the 1st day of January, 1908, the defendant, F. H. Stewart, was the assistant treasurer of the said Alaska Central Railway Co. and was the treasurer of the said Tanana Railway Construction Co., with his office at Seward, Alaska, in which official capacities he was charged with the custody and disbursement of all of the funds of said corporations deposited at Seward, Alaska, or along the line of the Alaska Central Railway Co. during the period of his incumbency of said positions of assistant treasurer and treasurer respectively.

7th. That during the period of said defendant's incumbency as assistant treasurer and treasurer as

aforesaid of said corporations, he received into his custody and possession large sums of money belonging to the said Alaska Central Railway Co., but received the same as the treasurer of the said Tanana Railway Construction Co., but which money was the property of the said Alaska Central Railway Co. and that a large part of the money so received and which came into his hands as aforesaid the defendant has failed to account for, to wit:

The sum of $11,608.34, and that on the 31st day of October, 1907, the said defendant entered upon the books of the said Tanana Railway Construction Co. a statement of said account and admitted the same, and designated the same on the books of the said Tanana Railway Construction Co. as: "F. H. Stewart, Adjustment Acct. No. 1." which said account shows a balance due on said account of said defendant of the sum of $11,608.34; and the further sum of $11,188.25, and that on the 10th day of September, 1907, the said defendant, while acting as treasurer as aforesaid, and in the books of the said Tanana Railway Construction Co. kept by said defendant, entered and stated an account in the said sum of $11,188.25, under the title of: "F. H. Stewart, Adjustment Acct. No. 2." making a total indebtedness of $22,796.59, and that the said defendant on the 31st day of December, 1907, gave to the said Tanana Railway Construction Co. two notes to cover the said adjustment accounts, each note being for the identical sum mentioned in the adjustment accounts.

8th. That no part of said indebtedness has been

paid, and that there is now due thereon from said defendant to this plaintiff the sum of $22,796.59.

As Conclusions of Law, I find:

1st. That plaintiff is entitled to judgment against the said defendant for the sum of $22,796.59, with interest thereon at the rate of 8 per cent per annum from December 31st, 1907, besides the costs and disbursements of this action.

Done in Valdez, Alaska, this 18th day of April, 1910.

By the Court,

PETER D. OVERFIELD,

Judge.

Entered Court Journal No. 5, page No. 809.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Receiver, Plaintiff, vs. F. H. Stewart, Defendant. Findings of Fact and Conclusions of Law and Judgment. Edmund Smith, E. E. Ritchie, Attorney for Plaintiff.

Filed in the District Court, Territory of Alaska, Third Division. Apr. 18, 1910. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy.

In the District Court for the Territory of Alaska Third Division.

377.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Judgment.

This matter coming on to be heard, Edmund Smith and E. E. Ritchie appearing for the plaintiff, and Brown & Lyons appearing for the defendant, each party having expressly waived a jury, and the cause being tried by the Court without a jury, and the Court having made and filed its written opinion herein, and having made and filed its Findings of Fact and Conclusions of Law, and being fully advised in the premises:

It is ordered and adjudged, that plaintiff have and recover of and from the above named defendant the sum of $22,796.59, with interest thereon at the rate of 8 per cent per annum from December 31st, 1907, besides the costs and disbursements of this action.

Done in open Court, Valdez, Alaska, this 18th day of April, 1910.

By the Court,

PETER D. OVERFIELD,

Judge.

Entered Court Journal No. 5, page 812.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Receiver, Plaintiff, vs. F. H. Stewart, Defendant. Findings of Fact and Conclusions of Law and Judgment. Edmund Smith, E. E. Ritchie, Attorneys for Plaintiff. Filed in the District Court, Territory of Alaska, Third Division. Apr. 18, 1910. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy.

In the District Court for the Territory of Alaska, Third Division.

#377.

O. G. LABEREE, Receiver, etc.,

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Order Extending Time to Move for New Trial.

Now, on this 18th day of April, A. D. 1910, the defendant by his attorneys, showing to the satisfaction of the Court, that an extension of time is necessary, within which defendant may move for a new trial herein—now, on motion of attorneys for defendant,

It is ordered that the defendant have thirty days from and after this 18th day of April, A. D. 1910, within which to prepare, serve and file his motion for a new trial herein.

Done this 30th day of April, A. D. 1910, as of date April 18th, 1910.

By the Court:

PETER D. OVERFIELD,

District Judge.

Entered Court Journal No. 5, page No. 841.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Receiver, Pltf. vs. F. H. Stewart, Dft. Order Extending Time to Move for a New Trial. Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the District of Alaska, Third Division.

#377.

O. G. LABEREE, Receiver etc.,

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Motion for New Trial.

Comes now the defendant and moves the Court to set aside the judgment and decision of the Court herein, dated the 18th day of April, A. D. 1910, adjudging that the plaintiff have and recover of the defendant the sum of $22,796.59, interest and costs, and to grant a new trial herein, for the following reasons materially affecting the substantial rights of the defendant in this to wit:

First. Insufficiency of the evidence to justify the decision of the Court, and that it is against law, in this to wit:

There is no evidence adduced by plaintiff to overcome or rebut the prima facie case of payment made out by the proofs of defendant, of the promissory

notes set forth in defendant's answer herein, and there is no evidence whatever in this case offered by plaintiff denying such payment, but that the only proof offered by plaintiff to meet or rebut such payment, were certain documentary proofs, claimed by plaintiff, to show fraud in such payment; and that at the time of such payment, plaintiff was receiver for the property in Alaska, of the corporations owning and to whom such payment was made.

Second. Errors in law occurring at the trial and excepted to by the defendant, in this, to wit:

The Court erred in admitting any evidence, over the objection of defendant, of the minutes of meetings of the Tanana Railway Construction Company, except the meeting at which the payment of said notes was ratified, for the reason that the only purpose for which it was claimed such testimony was competent or admissible, was that of fraud in the election and tenure of office of such trustees holding said meetings. The Court erred in admitting in evidence the Order appointing the plaintiff receiver, the same having been admitted by the answer, and said proofs was admitted for the sole and only purpose as claimed by plaintiff, of showing that the property of said corporations was in custodia legis at the time of the payment of said notes.

Dated this 30th day of April, A. D. 1910.

BROWN & LYONS,
Attorneys for Defendant.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Third Division. O. G. Laberee, Receiver, Pltf., vs. F. H. Stewart, Dft. Motion

for New Trial. Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Dep.

In the District Court for the Territory of Alaska, Third Division.

#377.

O. G. LABEREE, Receiver, etc.,

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Order Denying Motion for New Trial.

Coming on regularly to be heard the motion of the defendant to set aside the judgment and decision of the Court rendered herein in favor of the plaintiff and against the defendant, on the 18th day of April, A. D. 1910, and to grant defendant a new trial herein, and the Court being fully advised in the premises;

It is ordered that said motion be and the same is hereby overruled and denied.

To which ruling the defendant duly excepted and his exception is allowed.

Dated this 30th day of April, A. D. 1910.

By the Court:

PETER D. OVERFIELD,

Judge.

Entered Court Journal No. 5, page No. 845.

[Endorsed]: No. 377. In the District Court, for the Territory of Alaska, Third Division. O. G. Lab-

eree, Receiver, Pltf., vs. F. H. Stewart, Dft. Order Denying Motion for New Trial. Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART.

Defendant.

Bill of Exceptions.

Be it remembered, that on the 11th day of December, 1909, defendant served and filed his amended complaint herein.

(Here insert copy of amended complaint.)

That on the 29th day of March, 1910, defendant served and filed his answer herein (here insert copy of answer), and on the 5th day of April, 1910, the plaintiff served and filed his reply herein (here insert copy of reply); that thereafter and on the 6th day of April, 1910, the said cause came on regularly for trial before the Court, plaintiff and defendant having in open court waived a jury, and thereupon the following proceedings were had:

Defendant offered and the same was received in evidence, exhibit No. 1, to wit: pages 29 and 31 of the

Minute-book of the Tanana Railway Construction Co., a corporation, being the minutes of the meeting of the Trustees of said corporation, held April 3d, 1909 (here insert copy of pages 29 and 31 of said book).

Defendant next offered in evidence exhibit No. 2, being a letter from A. C. Frost, President of the Alaska Central Railway Co., and the managing agent of the Tanana Railway Construction Co., to the defendant, dated March 25th, 1909 (here insert copy of said letter).

Defendant next offered in evidence exhibit No. 3, one of the promissory notes mentioned in defendant's answer (here insert copy of said note).

Defendant next offered in evidence exhibit No. 4, being the second promissory note mentioned in defendant's answer (here insert copy of said note).

That the genuineness of the signature of said A. C. Frost and the genuineness of the said minutes of said trustees' meeting of April 3d, 1909, was duly admitted in open court by plaintiff. Whereupon defendant rested.

The plaintiff thereupon offered in evidence Plaintiff's Exhibit No. 5, being the order of this Court in the case of the Trusts & Guarantee Co., Ltd., against the Alaska Central Railway Co., the Tanana Railway Construction Co., the Central Trust Co. of Illinois, Ball Bros. Glass Manufacturing Co., A. C. Frost, H. C. Osborne, and John E. Ballaine, appointing O. G. Laberee, plaintiff in this action, Receiver of the property of said Alaska Central Railway Co. and the Tanana Railway Construction Co., situated in

the Territory of Alaska, to which the defendant objected as irrelevant, incompetent and immaterial to any issue in this case. The same was admitted in evidence and the defendant duly excepted (here insert copy of said order).

Plaintiff thereupon offered in evidence pages 7, 9, 11, 13, 19 and 21, 23, 25, 27, 33, 35, 37, and 39 of the Minute-book of the said Tanana Railway Construction Co., being copies of the proceedings of the Board of Trustees of said company at meetings held just prior and just subsequent to the said meeting of said Trustees of April 3d, 1909, to which evidence the defendant objected, on the ground that the said evidence was irrelevant, incompetent and immaterial to any issue in this case, there being no issue of fraud raised by the reply or by any of the pleadings herein. The said documentary evidence was admitted in evidence by the Court, to which the defendant duly excepted (here insert the obove pages).

That on the 18th day of April, 1910, the Court rendered his decision herein, and made and entered its Findings of Facts and Conclusions of Law herein, to which the defendant duly excepted (here insert findings of fact and conclusions of law).

That on the said 18th day of April, 1910, the Court made and entered its judgment herein, adjudging that the plaintiff have and recover of the defendant the sum of $22,796.59 together with interest at the rate of 8 per cent per annum from December 31st, 1907, and for costs (here insert copy of said judgment), to which said judgment the defendant then and there duly excepted.

Now comes the defendant, by Brown & Lyons, his attorneys, and do make and file this his Bill of Exceptions, and pray the Court to file and settle said Bill of Exceptions and have the same made a part of the record in the above-entitled case:

1. Defendant excepts to the ruling of the Court admitting in evidence Plaintiff's Exhibit No. 5.

2. Defendant excepts to the ruling of the Court admitting in evidence the said pages: 7, 9, 11, 13, 19, 21, 23, 25, 27, 33, 35, 37 and 39 of the Minute-book of said Tanana Railway Construction Co.

3. Defendant excepts to the Findings of Fact and Conclusions of Law made by the Court and entered on the 18th day of April, 1910, in favor of the plaintiff and against the defendant.

4. Defendant excepts to the Judgment of the Court entered herein the 18th day of April, 1910, in favor of the plaintiff and against the defendant.

5. Defendant excepts to the ruling of the court in denying defendant's motion for a new trial, made and entered here on the 30th day of April, 1910.

BROWN & LYONS,
Attorneys for Defendant.

Order Allowing Bill of Exceptions.

The above and foregoing Bill of Exceptions and each of them are, by this Court, duly allowed and settled, and such exceptions are hereby ordered filed and made a part of the record in said case.

Dated this 2d day of May, A. D. 1910.

PETER D. OVERFIELD,
District Judge.

Due and lawful service of the foregoing Bill of Exceptions and Order is accepted this 2d day of May, A. D. 1910, by receiving a true copy thereof.

E. E. RITCHIE,
EDMUND SMITH,
Attorneys for Plaintiff.

Entered Court Journal No. 5, page 850.

[Endorsed]: Bill of Exceptions and Order Allowing Bill of Exceptions. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the District of Alaska, Third Division.

O. G. LABEREE, Receiver, etc.,
Plaintiff and Defendant in Error,

vs.

F. H. STEWART,
Defendant and Plaintiff in Error.

Assignment of Errors.

Comes now F. H. Stewart, defendant in the above-entitled action, and plaintiff in error herein, and makes and files the following assignments of errors, on which he will rely in the prosecution of his writ of error in the above-entitled cause.

I.

The Court erred in admitting in evidence, over the objection of defendant, plaintiff's exhibit, being the order of the Court in the case of the Trusts & Guarantee Company, Ltd., against the Alaska Central Railroad Company, the Tanana Railway Construc-

tion Company et al., in the District Court for the District of Alaska, Third Division, appointing O. G. Laberee, the plaintiff herein, receiver of the property of said Alaska Central Railway Company and said Tanana Railway Construction Company, in Alaska, for the reasons following, to wit:

The complaint of plaintiff, and the record herein, show that both said companies are incorporated and existing under the laws of the State of Washington.

The notes set out in defendant's answer, were dated at and made at Montreal (Canada), and no place of payment being designated therein, the presumption obtains that said notes were payable at the place of making, and by the lex loci contractus. The record also shows: (Defendant's Exhibit 1, and plaintiff's exhibits, being pages 19 to 39, inclusive, of the Minute-book of the Tanana Railway Construction Company, of meetings of its Board of Trustees), that said corporation had its principal place of business, and was transacting business at Seattle, State of Washington; and therefore the appointment of a receiver over its property, in Alaska, in the absence of some ancillary or other proper proceeding in the State of Washington, would not and could not affect the business or property of said corporation in said State of Washington, or elsewhere, outside the District of Alaska.

II.

The Court erred in admitting in evidence, over the objection of defendant, the minutes of the Trustees' meetings of said Tanana Railway Construction Company, held in Seattle, Washington, to wit: pages 7,

9, 11, 13, 19, 21, 23, 25, 27, 33, 35, 37 and 39 of said minute-book, for the reason that said records were offered for the sole and only purpose of showing fraud on the part of the officers of said Tanana Railway Construction Company in accepting payment of the two notes in controversy herein, and there is no allegation of fraud made by plaintiff in this case, in the matter of such payment, and defendant had no notice of any such claim on the part of plaintiff; the defendant having pleaded payment and the plaintiff replying by a general denial, could not introduce evidence of fraud, in the absence of a plea or charge of fraud.

III.

The Court erred in finding as a fact herein, that the notes in controversy herein, had not been paid, for the reason that there is no competent, relevant or material evidence in this case, to rebut or overcome the prima facie case made by the defendant of the payment of said notes.

IV.

The Court erred in making as a conclusion of law herein, that said notes had not been paid, and that defendant was indebted to plaintiff on any account whatever, in any sum whatever.

V.

The Court erred in rendering judgment in favor of plaintiff and against defendant for the sum of $22,796.59, with interest and costs, and erred in rendering judgment against defendant for any sum and on any account whatsoever.

VI.

The Court erred in overruling and denying defendant's motion for a new trial, for all of the reasons hereinbefore given.

Wherefore, the plaintiff in error prays that the said judgment of the said District Court for the Territory of Alaska, Third Division, may be reversed.

BROWN & LYONS,

Attorneys for F. H. Stewart, Plaintiff in Error.

[Endorsed]: No. 377. In the District Court for the Territory of Alaska, Division No. 3, at Valdez. O. G. Laberee, Receiver, etc., Plaintiff and Defendant in Error, vs. F. H. Stewart, Defendant and Plaintiff in Error. Original. Assignment of Errors. Brown & Lyons, Attorneys for Plaintiff in Error, Valdez, Alaska. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

Due and legal service by copy, of the above and foregoing assignments of error, is accepted this 2d day of May, A. D. 1910.

E. E. RITCHIE,
EDMUND SMITH,

Attorneys for Plaintiff and Defendant in Error.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Petition for Writ of Error.

Comes now F. H. Stewart, defendant in the above-entitled cause, and says: That on the 18th day of April, 1910, the Court made and entered judgment herein in favor of the plaintiff and against the defendant, adjudging that the plaintiff have and recover of the defendant the sum of $22,796.59, with interest thereon at the rate of 8 per cent per annum from December 31st, 1907, besides the costs and disbursements of this action.

That in the said judgment and the proceedings had prior thereto, certain errors were committed, to the prejudice of the defendant, all of which will more fully appear in the assignment of errors which is filed with this petition.

Wherefore, defendant prays that a Writ of Error may issue in his behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of the errors so complained of, and that a

transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

BROWN & LYONS,
Attorneys for Defendant and Appellant.

Due and legal service by copy of the above petition is accepted this 2d day of May, A. D. 1910.

E. E. RITCHIE,
EDMUND SMITH,
Attorneys for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Order Allowing Writ of Error.

On this 2d day of May, A. D. 1910, came the defendant herein, by Brown & Lyons, his attorneys, and filed and presented to the Court their petition, praying for the allowance of the Writ of Error and the Assignment of Errors intended to be urged by them; praying also that a transcript of the record and proceedings and papers upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration of the premises, and the Court being fully advised,—

It is ordered, that the aforesaid Writ of Error, and the same is hereby allowed.

And it is further ordered, that a transcript of the record, papers, files and proceedings in this cause, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated this 2d day of May, A. D. 1910.

PETER D. OVERFIELD,
District Judge.

Entered Court Journal No. 5, page No. 850.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Order Fixing Amount of Bond on Writ of Error.

And now, on this 2d day of May, 1910, the defendant being desirous of having the judgment of this Court entered herein against the defendant in favor of the plaintiff reviewed on Writ of Review;

It is now hereby ordered, that the bond on said appeal or writ of review, which shall not stay execution under said judgment, but to secure the plaintiff and respondent for costs, be, and the same is hereby fixed at the sum of $250.00, with two sureties, and that the said bond be approved by the Clerk of this Court.

PETER D. OVERFIELD,
District Judge.

Entered Court Journal No. 5, page No. 853.

[Endorsed]: Order Fixing Amount of Bond on Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation).

Plaintiff and Defendant in Error,

vs.

F. H. STEWART.

Defendant and Plaintiff in Error.

Writ of Error [Original].

To the President of the United States of America, The Honorable Peter D. Overfield, Judge of the District Court for the Territory of Alaska, Fourth Division, Acting as Judge in the Third Judicial Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea, which is in said District Court before you or some of you, between O. G. Laberee, receiver, etc., defendant in error, and F. H. Stewart, plaintiff in error, a manifest error hath happened, to the great damage of the said F. H. Stewart, plaintiff in error, as is stated and appears manifest and apparent in and by their petition herein.

We, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, in the State of California, together with this Writ, so as to have the same at the City of San Francisco, in the State of California, on the 1st day of June, A. D. 1910, in said Circuit Court of Appeals to be then and there held:

That the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States and of the Territory of Alaska should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice Supreme Court of the United States, this 2d day of May, A. D. 1910.

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the Clerk's office, at Valdez, Alaska, on the day and year last above written.

[Seal] ED M. LAKIN,
Clerk of the District Court for the Territory of Alaska, Third Division.

Allowed this 2d day of May, A. D. 1910.

PETER D. OVERFIELD,
District Judge.

Entered Court Journal No. 5, page No. 851.

Due and legal service of the above Writ of Error

by receiving a true copy thereof was accepted this 2d day of May, A. D. 1910.

E. E. RITCHIE and
EDMUND SMITH,
Attorneys for Plaintiff and Defendant in Error.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver, etc.,
Defendant in Error,

vs.

F. H. STEWART,
Plaintiff in Error.

Bond on Writ of Error.

Know All Men By These Presents, that I, F. H. Stewart as principal, and D. M. Stewart and Wm. Holmes, as sureties, are held and firmly bound unto O. G. Laberee, Receiver, etc., the defendant in error, in the full sum of $500, to be paid to the said O. G. Laberee, Receiver, his heirs, executors, administrators or successors in office, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of May, A. D. 1910.

Whereas, lately, in the District Court for the Territory of Alaska, Third Division thereof, and a suit pending in said court between O. G. Laberee, Receiver, plaintiff, and F. H. Stewart, defendant, a judgment was rendered in favor of said O. G. Lab-

eree, Receiver, and against said F. H. Stewart, defendant, and the said F. H. Stewart, having obtained a Writ of Error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said O. G. Laberee, Receiver, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be holden at the City of San Francisco, in the State of California, on or after the 1st day of June, A. D. 1910;

Now, the condition of the above obligation is such, that if the said F. H. Stewart shall prosecute said Writ of Error to effect and to answer all the costs which may be awarded against him on said Writ of Error, then this obligation to be void; otherwise to remain in full force and effect.

F. H. STEWART,
Principal.
By D. M. STEWART,
Agent and Attorney.
D. M. STEWART,
WM. HOLMES,
Sureties.

Signed, sealed and delivered in the presence of
T. M. HALE,
E. P. GRAY.

Approved by
ED M. LAKIN,
Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: Bond on Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. June 18, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

#377.

O. G. LABEREE, Receiver, etc.,

Defendant in Error,

vs.

F. H. STEWART,

Plaintiff in Error.

Citation on Writ of Error [Original].

United States of America,
District of Alaska,—ss.

The United States of America, To O. G. Laberee, Receiver, etc., and to Edmund Smith and E. E. Ritchie, His Attorneys of Record, Greeting:

You are cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held at the City of San Francisco, in the State of California, within 30 days from the date of this writing, pursuant to a Writ of Error in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein F. H. Stewart is the plaintiff in error and you are the defendant in error, and to show cause, if any there be, why the judgment in said Writ of Error should

not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 2d day of May, in the Year of our Lord 1910, and of the Independence of the United States of America the 134th.

PETER D. OVERFIELD,
Judge of the District Court for the Territory of Alaska, Third Division.

[Seal] Attest: ED. M. LAKIN,
Clerk of the District Court for the Territory of Alaska, Third Division.

Entered Court Journal No. 5, page No. 852.

Due and legal service of the foregoing Citation by receiving a true copy thereof is accepted this 2d day of May, A. D. 1910.

E. E. RITCHIE and
EDMUND SMITH,
Attorneys for Defendant in Error.

[Endorsed]: Citation on Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

[Order Under Rule 16, Enlarging Time.]

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver, etc.,

Defendant in Error,

vs.

F. H. STEWART,

Plaintiff in Error.

ORDER EXTENDING TIME IN WHICH TO FILE THE RECORDS IN THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, ON WRIT OF ERROR.

It appearing to the satisfaction of the Court that 30 days is not sufficient time to prepare and send and have received by the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the records in the above-entitled cause in the Writ of Error from the final judgment rendered herein on the 18th day of April, A. D. 1910;

It is hereby ordered, that said F. H. Stewart, plaintiff in error herein, have to the 1st day of July, A. D. 1910, in which to have prepared the said records on his Writ of Error heretofore issued in said cause, and to file the same in said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 2d day of May, A. D. 1910.

PETER D. OVERFIELD,

District Judge.

Entered Court Journal No. 5, page No. 854.

[Endorsed]: Order Extending Time in Which to File the Records in the United States Circuit Court of Appeals, Ninth Circuit, on Writ of Error. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

In the District Court for the Territory of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

Stipulation [Re Record, Facts, and Findings].

It is hereby stipulated by and between the parties to the above-entitled action, by their respective attorneys, that the following is, and shall constitute a full, true and complete record on the Writ of Error in the above-entitled cause, to wit:

1st. Amended complaint.

2d. Answer.

3d. Reply.

4th. Defendant's Exhibits 1, 2, 3 and 4; and Plaintiff's Exhibit, consisting of pages 7, 9, 11, 13, 19, 21, 23, 25, 27, 33, 35, 37 and 39 of the Minute-book of the Tanana Railway Construction Company.

5th. Plaintiff's Exhibit 5, being an order appointing receiver in the case of the Trusts & Guarantee Co., Ltd., plaintiff, against the Alaska Central Railway Co., The Tanana Railway Construction Co., The Central Trust Co. of Illinois, Ball Bros. Glass Manufacturing Co., A. C. Frost, H. C. Osbourne, and John E. Bellaine, defendants, in the District Court for the Territory of Alaska, Third Division.

And it is hereby stipulated that said receiver duly qualified by taking the oath of office and giving the bond required by law, and the order of Court, but not waiving objection thereto as to competency, relevancy and materiality.

6th. And it is hereby stipulated that in the Findings of Fact, dated August 31, 1909, in said last above-mentioned case, found by said Court by consent of all parties, it was among other things found, and is also reiterated in the Decree in said action as follows: The Court finds that the Construction Company was a mere agency of the Railway Company for the construction of said railroad, using for that purpose the funds derived from the sale of the Railway Company's bonds, and that all the property and assets at any time acquired by or in the name of the Construction Company are in equity the property of the Railway Company and subject to the liens of the aforesaid mortgages.

7th. Findings of Fact and Conclusions of Law.

8th. Judgment.

8½. Order Extending Time to Move for New Trial.

9th. Motion for a New Trial.

10th. Order Denying Motion for a New Trial.

11th. Bill of Exceptions.

12th. Order Settling and Allowing Bill of Exceptions.

13th. Petition for Writ of Error.

14th. Order Allowing Writ of Error and Fixing Amount of Bond.

15th. Writ of Error.

16th. Bond on Writ of Error.

17th. Citation to Defendant in Error.

17½. Order Extending Time in Which to File Records in Circuit Court.

18th. Stipulation as to What Shall Constitute Record on Writ of Error.

Dated May 2, 1910.

E. E. RITCHIE,
EDMUND SMITH,
Attorneys for Plaintiff.
BROWN & LYONS,
Attorneys for Defendant.

[Endorsed]: Stipulation. Filed in the District Court, Territory of Alaska, Third Division. May 2, 1910. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy.

[Certificate of Clerk U. S. District Court to Record.]

In the District Court for the District of Alaska, Third Division.

O. G. LABEREE, Receiver of THE ALASKA CENTRAL RAILWAY CO. (a Corporation), and Receiver of THE TANANA RAILWAY CONSTRUCTION CO. (a Corporation),

Plaintiff,

vs.

F. H. STEWART,

Defendant.

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Ed. M. Lakin, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 65 pages, numbered from 1 to 65, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files of my office; that this transcript is made in accordance with a stipulation made and entered into by and between the parties plaintiff and defendant, as to what shall constitute the record on writ of error, filed in my office on the 2d day of May, A. D. 1910, and made a part of said transcript.

And I hereby certify that the foregoing transcript has been prepared, examined and certified to by me,

and that the costs thereof, amounting to $24.95, have been paid to me by F. H. Stewart, the plaintiff in error.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, this 21st day of June, A. D. 1910.

[Seal] ED M. LAKIN,
Clerk of the District Court for Territory of Alaska, Third Division.

By ————————,
Deputy Clerk.

[Endorsed]: No. 1874. United States Circuit Court of Appeals for the Ninth Circuit. F. H. Stewart (Defendant), Plaintiff in Error, vs. O. G. Laberee, Receiver of the Alaska Central Railway Company (a Corporation), and Receiver of the Tanana Railway Construction Company (a Corporation), (Plaintiff), Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the Territory of Alaska, Third Division.

Filed June 30, 1910.

F. D. MONCKTON,
Clerk.
By Meredith Sawyer,
Deputy Clerk.

No. 1874

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

F. H. STEWART (Defendant),
Plaintiff in Error,

vs.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY COMPANY (a corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION COMPANY (a corporation), (Plaintiff),
Defendant in Error.

Opening Brief for Plaintiff in Error.

FERNAND de JOURNEL,
Attorney for Plaintiff in Error.

Filed this.....day of September, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1874

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

F. H. STEWART (Defendant),
Plaintiff in Error,

vs.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY COMPANY (a corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION COMPANY (a corporation), (Plaintiff),
Defendant in Error.

Opening Brief for Plaintiff in Error.

Statement of the Case.

This is an action by defendant in error, O. G. Laberee, one of the receivers in Alaska of the Alaska Central Railway Company, and of the Tanana Railway Construction Company, against the plaintiff in error, F. H. Stewart, who, from February 1, 1905, until December 31, 1907, had been the Assistant Treasurer of the Alaska Central Railway Co., and the Tanana Railway Construction Co., to

recover from said Stewart, $22,796.59. This amount made of two items: $11,608.34 and $11,188.25, respectively, found by said receiver on the books of the Tanana Railway Construction Co., as being due and owing by the said plaintiff in error.

Said books did not show any credit against this account.

The receiver in his complaint further sets forth: That the Alaska Central Railway Co., and the Tanana Railway Construction Co., are corporations, duly organized and existing under the laws of the State of Washington, and doing business in Alaska; that all the assets of the Tanana Railway Construction Co. really belong to the Alaska Central Railway Co.; his appointment as receiver in Alaska, giving him the custody and control of all the assets of these corporations there; the employment by the corporations of the said F. H. Stewart, as hereinbefore mentioned; his debt to them; his failure to account for, or pay same.

The plaintiff in error denies in his answer his failure to account, but avers that he did account for the debt, that he gave his promissory notes therefor, and that prior to action said notes were fully paid, satisfied and cancelled, and thus denies that he is indebted to the corporations or to the receiver.

The defendant in error denies in his reply, the payment of the sum mentioned and described in his complaint or of any part thereof.

The evidence is wholly documentary, and consists on the part of the defendant below of 4 exhibits introduced by him without objection, being two promissory notes (Ex. 3 and 4) and a letter from A. C. Frost (Ex. 2), who appears to have been the President and Managing Agent of the corporations, and wherein the payment is mentioned, and the resolution (Ex. 1), as it appears on the minute books of the officers of the corporation, approving and confirming the transaction. It consists on the part of the plaintiff below of some further resolutions of the said officers and of the order appointing the receiver, all of which were admitted over the objection of the defendant below (Tr. pp. 10 to 36).

Both sides in open Court expressly waived a jury. The Court tried the case and found for defendant in error for the entire amount sued for with interests and costs, which said judgment plaintiff in error now seeks to have reviewed and reversed.

The main facts are:

1. That F. H. Stewart, plaintiff in error, was Treasurer as aforesaid for the corporations from February 1, 1905, until December 31, 1907.

2. That the debt was incurred prior to the 31st day of October, 1907, and was accounted for and entered on the books of the Tanana Railway Construction Co., in two items under the following headings:

"September 10th, 1907, F. H. Stewart, Adjust-
" ment Acct. No. 2—$11,188.25".

"October 31st, 1907, F. H. Stewart, Adjustment
" Act. No. 1—$11,608.34".

3. That on the 21st day of December, 1907, at Montreal, Canada, plaintiff in error gave in settlement of the two above open accounts, his promissory notes payable on demand to the Tanana Railway Construction Co., for said same amounts.

4. That on December 31, 1907, plaintiff in error left the employment of the said corporations as Treasurer or otherwise.

5. That on the 23rd day of October, 1908, defendant in error was appointed by the District Court for the Territory of Alaska, 3rd Division, as one of the receivers of all the assets of these two corporations in Alaska.

6. That the plaintiff in error, on the 1st day of March, 1909, paid to one A. C. Frost, who appears to have been the General Agent outside of Alaska for these two corporations, and who was seemingly acting in the matter of this particular transaction under the instructions of the stockholders to so settle and compromise the said claim, the sum of $6,000 in full settlement.

7. That upon the payment being made, the two said notes were cancelled and surrendered to plaintiff in error.

8. That subsequent to the said payment, cancellation and surrender, to wit: On April 3, 1909, the Board of Trustees of the Tanana Railway Construction Company, in meeting duly assembled at Seattle, State of Washington, being the principal place of business of the said corporations, approved, ratified and confirmed the prior action of the said A. C. Frost, in the matter of the said payment, settlement, satisfaction, cancellation and surrender.

None of these facts seem to be controverted but their effect is disputed as to the payments and satisfaction, and in this controversy the following questions arise.

I.

Was this former asset of the corporation removed, by the giving of said notes, from Alaska to the place of payment or the place of demand, and was the implied contract of Stewart to pay his debt where same was contracted, superseded by his express promise in the notes to pay the sum elsewhere, presumptively at Montreal, where the notes were made or at least wherever the holder would make demand?

II.

Could the question of fraud be raised and evidence be adduced thereupon by the defendant in error without any pleadings on his part?

III.

Had the stockholders and officers of the corporations at their principal place of business, to wit: Seattle, the right to compromise and settle the said claim of the corporations against this debtor?

IV.

When the plaintiff in error had shown the Court that the notes were in his possession, surrendered and cancelled, and had produced them to the Court, had he not made a prima facie proof of payment and satisfaction sufficient to meet successfully the pleadings and the proof of the defendant in error?

These points seem to include all the questions involved in this case and were decided against the plaintiff in error, who assigns in support of his application to this Court for a reversal of the judgment the following errors upon which he will rely.

Specification of Errors.

I.

The Court erred in admitting in evidence, over the objection of defendant, plaintiff's exhibit, being the order of the Court in the case of the Trusts & Guarantee Company, Ltd., against the Alaska Central Railway Company, the Tanana Railway Construction Company et al., in the District Court for the District of Alaska, Third Division, appointing

O. G. Laberee, the plaintiff herein, receiver of the property of said Alaska Central Railway Company, and said Tanana Railway Construction Company, in Alaska, for the reasons following, to wit:

The complaint of plaintiff, and the record herein, show that both said companies are incorporated and existing under the laws of the State of Washington.

The notes set out in defendant's answer, were dated at and made at Montreal (Canada), and no place of payment being designated therein, the presumption obtains that said notes were payable at the place of making, and by the lex loci contractus. The record also shows (Defendant's Exhibit 1, and Plaintiff's Exhibits, being pages 19 to 39, inclusive, of the minute book of the Tanana Railway Construction Company, of meetings of its Board of Trustees): that said corporation had its principal place of business, and was transacting business at Seattle, State of Washington, and therefore the appointment of a receiver over its property, in Alaska, in the absence of some ancillary or other proper proceedings in the State of Washington, would not and could not affect the business or property of said corporation in said State of Washington, or elsewhere, outside the District of Alaska.

The said Plaintiff's exhibit reads as follows:

"PLAINTIFF'S EXHIBIT No. 5

"In the District Court for the Territory of Alaska,
"Third Division.
"No. 343

"The Trusts & Guarantee Company, Limited,
Plaintiff,
vs.
"The Alaska Central Railway Company, The Tanana Railway Construction Company, The Central Trust Company of Illinois, Ball Bros. Manufacturing Company, A. C. Frost, H. C. Osborne, John E. Ballaine,
Defendants.

"ORDER APPOINTING RECEIVERS
"(etc., in Case No. 343).

"This cause coming on to be heard upon the ver-
" ified complaint of the plaintiff, together with
" evidence heard in open court and stipulations
" made, J. M. Lathrop, Esquire, and F. H. Graves,
" Esquire, appearing for the plaintiff, and F. M.
" Brown, Esquire, and James A. Haight, Esquire,
" appearing for the defendants, The Alaska Central
" Railway Company and the Tanana Railway Con-
" struction Company, and it appearing to the Court
" that the other defendants were not material to be
" represented upon the hearing of this motion, and
" counsel for the defendant The Tanana Railway

" Construction Company objecting to the jurisdic-
" tion of the Court over that company and its prop-
" erty and objecting to an order appointing a re-
" ceiver over that company, or any of its property,
" and the Court being fully advised in the prem-
" ises, now, on motion of counsel for the plaintiff,

"It is ordered by the Court that O. G. Laberee
" and John A. Goodwin, be, and hereby are ap-
" pointed receivers of this Court of all and singular
" the property, assets, rights and franchises of the
" Alaska Central Railway Company described in
" the complaint herein, and of the Tanana Railway
" Construction Company described in the complaint
" herein, situated in the Territory of Alaska, in-
" cluding all the railroad tracks, terminal facilities,
" real estate, warehouses, offices, stations, and all
" other buildings and property of every kind, owned,
" held, possessed or controlled by said companies, or
" either of them, in said Territory, together with
" all other property in connection therewith, and
" all moneys, choses, credits, bonds, stocks, lease-
" hold interests, contracts, and other assets of every
" kind, and timbers, equipment, rails, ties, and all
" other property real, personal and mixed held or
" possessed by them, or either of them, or hereafter
" acquired, or to be acquired or obtained by them,
" or either of them. To have and to hold the same
" as the officers of and under the orders and direc-
" tions of the Court.

"The said receivers are hereby authorized and di-
" rected to take immediate possession of all and
" singular the property above described, wherever
" situated or found in this Territory, and to hold the
" same, and to preserve the same free from injury
" and deterioration as far as possible, and to dis-
" charge all the duties obligatory upon said com-
" panies, or either of them, so far forth as they
" may from time to time be ordered and directed
" by this Court.

"And the said Alaska Central Railway Company
" and the Tanana Railway Construction Company,
" and each of them, and the directors, agents and
" employees of them and each of them, are hereby
" required and commanded forthwith to turn over
" and deliver to such receivers or their duly con-
" stituted representatives, any and all books of ac-
" count, vouchers, papers, deeds, leases, contracts,
" bills, notes, accounts, money or other property in
" his or their hands, or under his or their control,
" and they are hereby commanded and required to
" obey and conform to such orders as may be given
" them from time to time by the said receivers, or
" their duly constituted representatives in conduct-
" ing the business of the said defendants, and in
" discharging their duty as receivers, and they, and
" each of them, and the defendants in this cause, and
" each of them, are hereby enjoined and restrained
" from interfering in any way whatever with the
" possession or management of any part of the

" business or property over which said receivers
" are so appointed or from in any way preventing
" or seeking to prevent the discharge of their duties
" as such receivers; and said receivers are hereby
" fully authorized and empowered to fix the com-
" pensation of all such agents, employees and counsel
" as may be required for the proper discharge of
" the duties of this trust.

"Said receivers are hereby fully authorized and
" empowered to institute and prosecute all such
" suits as may be necessary in their judgment for
" the proper protection of the property and trust
" hereby vested in them, and likewise to defend all
" actions instituted against them as receivers, and,
" also, to appear and conduct the prosecution or
" defense of any and all suits or actions pending
" against said companies, or either of them, the
" prosecution or defense of which will, in the judg-
" ment of said receivers, be necessary and proper
" for the protection of the property and rights
" placed in their charge, and for the interest of the
" creditors and stockholders of said companies.

"It is further ordered that said receivers shall
" have all such additional power and authority as
" receivers as is given by the statutes of the Terri-
" tory of Alaska, and all such power and authority
" as is usual in the appointment of a receiver in
" such cases and under such circumstances, for the
" protection of the said property and the preserva-
" tion thereof, without any special order being made
" by this Court in that behalf.

"It appearing to the Court that in a suit now " pending in this court, wherein defendant in this " cause, John E. Ballaine, was plaintiff, and defend- " ants the Alaska Central Railway Company, The "Tanana Railway Construction Company, A. C. " Frost, and H. C. Osborne were defendants, this " Court did make an order on the 19th day of May, " 1908, at Fairbanks in this Territory, appointing " one John A. Goodwin to be receiver of the prop- " erty of the defendant corporations aforesaid, and " that the property of said corporations, pursuant to " said order, was turned over to said Goodwin as " such receiver, and is now in his possession and " under his control,

"It is further ordered and directed that the said " John A. Goodwin, as receiver in said cause, turn " over and deliver to the receivers appointed by this " order all property of whatsoever kind, character, " nature or description which has come into his " hands and of which he has now control or posses- " sion by virtue of such receivership; and that this " order, and the receivership hereby created shall, " and is hereby ordered and directed to supersede " and take the place of the said receivership of the " said John A. Goodwin; and it is further ordered " and directed that the receivers appointed by this " order shall take the property, and the possession " thereof, and shall hold and administer the same, " and every part thereof, subject to such order as " this Court may hereafter lawfully make touching

" the expenses of the said receivership of the said " John A. Goodwin and subject to any lien for the " charges of said receivership of the said John A. " Goodwin as and to the extent the same may here- " after be declared and allowed by the Court.

"It is further ordered and directed that the Court " retains the old receivership cause for the purpose " of settling accounts and of determining against " what parties and what property the charges of " said receivership shall be assessed.

"Each of the receivers hereby appointed is re- " quired to give bond in the sum of Fifty Thousand " ($50,000) Dollars, with security satisfactory to " this Court, for the faithful discharge of his duties. " The receivers are required to make and file full " reports in this court semi-annually, and the Court " reserves the right, by orders hereinafter to be " made, to protect and control all payments and all " claims, and in all respects to regulate and to con- " trol the conduct of said receivers.

"It is further ordered and directed by the Court " that upon the death, resignation or other disquali- " fication to act of either of the receivers hereby ap- " pointed, all the powers and duties hereby con- " ferred upon said receivers jointly shall be exer- " cised and discharged by the survivor until such " time as the Court shall in that behalf make fur- " ther or other orders.

"To all of which, and every part thereof, the de- " fendant, The Tanana Railway Construction Com-

" pany, excepts, and the exception in open court is " hereby allowed.

"Done in open court at Valdez, Alaska, this 23d " day of October, A. D. 1908.

"SILAS H. REID,
"District Judge.

"Entered in Court Journal No. 5, page 43.

"[Endorsed]: Order Appointing Receiver. 377, " Pltf. X. 5."

II.

The Court erred in admitting in evidence, over the objection of defendant, the minutes of the Trustees' meetings of said Tanana Railway Construction Company, held in Seattle, Washington, to wit: pages 7, 9, 11, 13, 19, 21, 23, 25, 27, 33, 35, 37, and 39 of the said minute book, for the reason that said records were offered for the sole and only purpose of showing fraud on the part of the officers of said Tanana Railway Construction Company, in accepting payment of the two notes in controversy herein, and there is no allegation of fraud made by plaintiff in this case, in the matter of such payment, and defendant had no notice of any such claim on the part of plaintiff; the defendant having pleaded payment and the plaintiff replying by a general denial, could not introduce evidence of fraud, in the absence of a plea or charge of fraud.

Said Plaintiff's Exhibit is spread at pages 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and

30, of the transcript in this case and in substance recites:

A meeting of all the stockholders of the Tanana Railway Construction Company, held at Seattle, Washington, the 15th of May, 1908.

1st. Transfer of stock ratified and confirmed.

2nd. Transfer of stock ratified and confirmed.

Article IX of by-laws regarding capital stock amended.

All Trusteeship of said Company made vacant.

Transfer of stock resolved.

New Trustees elected.

A meeting of the Trustees of said corporation, at Seattle, Washington, 15th day of May, 1908.

Resolution for amendment of Article IX of by-laws regarding capital stock.

Resolution vacating the office of President, Vice President, Secretary, and Treasurer.

Sydney Livesey, elected Chairman. Walter S. Brown, Secretary. Frank Brown, elected President. Walter S. Brown, elected Secretary. Frank Brown, elected Treasurer. Sydney Livesey, elected Vice-President.

Adjourned meeting of all the stockholders of said corporation, held at Seattle, Washington, the 15th day of May, 1908: approving and confirming all proceedings of the previous meetings of stockholders and Trustees hereinbefore mentioned.

Meeting of the Trustees of said corporation, held at Seattle, Washington, on the 7th day of April, 1909:

Resignation of Sydney Livesey as Trustee accepted, George Turner elected in his stead.

Resignation of Frank Brown as President and Treasurer accepted, Wm. R. McDonald elected in his stead as President, James A. Haight elected as Treasurer.

Resignation of Sydney Livesey as Vice President, accepted; Guy Sanborne elected as Vice President in his stead.

Resignation of Walter S. Brown as Secretary accepted; James A. Haight elected in his stead.

Resignation of Walter S. Brown as Trustee, accepted; Wm. R. McDonald elected in his stead.

Resignation of Charles R. Barney accepted; J. C. Williams elected in his stead.

Adjournment.

III.

The Court erred in overruling the defendant's objection to finding of fact No. 8 of the findings of fact, signed and filed in this cause, and in making the same which reads as follows:

"That no part of said indebtedness has been paid " and there is now due thereon from said defendant " to this plaintiff the sum of $22,796.59."

IV.

The Court erred in overruling the defendant's objection to the first conclusion of law signed and filed in this cause and in making same which reads as follows:

"That plaintiff is entitled to judgment against "said defendant for the sum of $22,796.59, with "interest thereon at the rate of 8 per cent per "annum from December 31st, 1907, besides the "costs and disbursements of this action."

V.

The Court erred in rendering and entering a judgment in favor of plaintiff and against defendant for the sum of $22,796.59, with interest and costs, and erred in rendering judgment against defendant for any sum and on any account whatsoever.

VI.

The Court erred in overruling and denying defendant's motion for a new trial, for all of the reasons hereinbefore given.

VII.

That the Court erred in overruling the defendant's objections to the findings of fact and conclusions of law signed and filed by the Court in this cause.

VIII.

That the Court erred in failing to find and adjudge that upon the facts and the law and the evidence adduced by both sides, the plaintiff's complaint should be dismissed upon its merits and the defendant should recover his costs and disbursements.

Argument.

I.

"The Court erred in admitting in evidence, over "the objection of defendant, plaintiff's exhibit, "being the order of the Court in the case of the "Trusts & Guarantee Company, Ltd., against the "Alaska Central Railway Company, the Tanana "Railway Construction Company et al., in the Dis- "trict Court for the District of Alaska, Third Di- "vision, appointing O. G. Laberee, the plaintiff "herein, receiver of the property of said Alaska "Central Railway Company, and said Tanana Rail- "way Construction Company, in Alaska".

The record does not show when or how the defendant contracted the debt, but it discloses (Tr. pp. 3 and 4), that while being in the employ of the corporations, he caused two entries to be made in the books showing the Adjustment Accounts: The first, on the 10th day of September, 1907, for $11,188.25, and the second, on the 31st day of October, 1907, for $11,608.34.

The receiver, having found these two debits standing on said books without any credit entry, entered action to recover from defendant, alleging his failure to account for same. The defendant's answer denies the failure to account, but admits that he was formerly indebted to the Company in about the sum mentioned.

The evidence discloses, however, that some accounting had already been made about the same funds, and that the said defendant (Tr. p. 11), had given a note for $8,000 to the Alaska Central Railway Co., prior to giving the two notes to the Tanana Railway Construction Co., in final settlement of the account.

Whatever may have been the previous dealings or transactions of accounting between the defendant and the corporations in Alaska, it is undisputed that on December 21, 1907, at Montreal, Canada, and while the corporations, as far as the record shows, were perfectly solvent, the corporations and the defendant finally and definitively adjusted and settled all their past claims, and closed these accounts by the making and delivery, by defendant, of two negotiable promissory notes payable on demand and mentioning in the body thereof that it would include the $8,000 note previously given (Tr. p. 11).

No evidence is adduced that this note for $8,000 was due, and the presumption obtains that if it was not paid, it was because it was not due, and thus the considerations for these two notes were for the

debtor: partly the settlement of the adjustment accounts which we submit were thereby discharged (or at least suspended), and of the $8,000 note which was thereby absolutely cancelled, and for the corporations the receiving of negotiable demand notes in place of a time note and an open account, and the change of place of payment all of which were sufficient considerations.

The presumption of law is that they were payable at Montreal and that they were paid there.

> "The place at which a promissory note bears date is held to be prima facie the place where the note was made, and this place is also presumed to be the place of the maker's residence".
>
> *8 Cyc.* p. 217—citing *Britton v. Niccolls,* 104 U. S. 757.

> "Where no place of payment is expressed, a note is payable prima facie where it is dated."
>
> *7 Cyc.* p. 634.

The giving of the two notes thus closing the account occurred 10 months before the appointment of the receiver, consequently he had then, no right that could intervene.

It is to be noted, that immediately thereafter, to wit: within 10 days of that event, the defendant either left or was removed from his position as Assistant Treasurer (Tr. p. 38).

We have therefore, prior to the giving of these two notes, an implied promise to pay whatever indebtedness existed on the Adjustment Accounts, and

an express promise to pay the $8,000. Such was the position of the corporations and the defendant prior to December 21, 1907, when the defendant and the corporations made new agreements, to wit: The two notes adduced in evidence.

It is quite certain that the notes never re-entered the Territory of Alaska, otherwise they would have been entered on the books of the corporations in Alaska, and the receiver would have shown the transaction to the Court.

It is further to be presumed that they were not intended to be sent back to Alaska. The plaintiff in error having left the employment of the company had no reason to return there and the notes must have been left either with Mr. Frost, who appears by the record to have been the General Agent of the company (Tr. p. 12), or at its principal place of business, to wit: Seattle, as it seems that that part of their business which had to do with the financial arrangements was transacted outside and only the construction work was done inside of Alaska.

The fact that no entry was made on the books in Alaska, of the giving of the $8,000 note or of the other two notes, shows also that it was not the intention of the parties to carry the account there or to have the payment made there, as it is the plain, usual course of business and commerce to close an open account by a credit for the paper and charge bills receivable for same.

We submit that this was not done because there was a removal of this asset to Seattle. This entry was very probably passed in the books of the company at their principal place of business, but this defendant could not show it, nor did he need to show it: it was sufficient for him to produce the cancelled notes, and of course, it would have been detrimental to the receiver to show it.

We further submit that it must have been the intention of all the parties to these new contracts, that the defendant should not resume his employment on the company's staff as he would not have had time in 10 days to journey from Montreal, Canada, to his post at Seward, Alaska (Tr. p. 3), before receiving his recall, and they therefore intended that the demand notes should be retained by the corporations or their agent at their principal place of business, and that they would be presented to and paid by the said defendant outside, whenever these corporations thought fit to enforce the collection.

Had it been contemplated by the parties to the contract, to wit: the corporations and the defendant, that he should return to Alaska and pay the amount of the notes there (whether he was to resume his employment or not), they would have made the notes payable there, and we submit that if they did not do that it was because they knew and intended that the place of payment would not be in Alaska.

But aside from what we may try to presume from the circumstances attending the contract, the authorities rule, that if a note is dated at *a particular place* and does not specify any place of payment, the place of payment is presumptively the place of date (*Cyc.,* Volume 7, p. 994).

In view of the fact that the corporations were incorporated and existing under the laws of the State of Washington, with their principal place of business in Seattle, that they only did construction work in Alaska, and that they had no place of business in Montreal, it is proper to call Montreal *a particular place* of making and date of said notes, and therefore, the rule given us by the authorities should apply, and the presumption should obtain.

We will readily concede that there are many authorities to the effect that a note given by a debtor to a creditor, in the ordinary course of business for a balance of open account does not necessarily operate as an extinguishment of the debt. This is a great deal a question of intention between the parties, and they speak through their actions in the matter.

The note (Exhibit 4, Tr. p. 14), expressly provides that the $8,000 obligation shall be included. This $8,000 was clearly part of the adjustment account and that very part was undoubtedly thereby extinguished. If the intention was to merge it in part, is it not fair to presume that it was a novation of the whole? How could it be separated?

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The date of payment of an adjustment account is uncertain: Some of the items may have to be proven against the debtor, and for many reasons it may not be payable forthwith. The $8,000 note may have had a long time to run but the record is silent as to this. However, we know that in lieu of the old adjustment account (which included the $8,000 note), these two new notes were given and their term of payment set beyond dispute, to wit: On demand: This meant payable at the pleasure of the corporations or their indorsee; they were negotiable and were presumably negotiated. Mr. Frost says in his letter (Defendant's Exhibit 2, Tr. p. 13):

"Boland asked me when here this week, regarding "*your obligations* to the Construction Co. I told "him that you had settled with me for the same. "He said that the Sovereign Bank people will re- "gret to learn that, for the reason that they pre- "ferred the claim to any settlement". (Italics ours.)

This paragraph cannot be understood otherwise than meaning to say, that the Sovereign Bank people had an interest in this paper to the point of regretting the surrender thereof, i. e., they would rather have had the paper than the $6,000. This is the only part of the letter referring to the defendant. The fourth paragraph which mentions a settlement, refers to the settlement by way of a foreclosure and the raising of $250,000.

Further—the parties agreed also to modify that part of the first implied contract which had to do

with the place of payment of the amount and to substitute thereto a new agreement. The adjustment account was payable in Alaska where the debt was incurred. The notes were made payable outside of Alaska.

The payees were also different: The $8,000 note was payable to the Alaska Central Railway Company, while the adjustment account was due to the Tanana Railway Construction Co. The amounts were the only features that remained the same. It is plain that there were two contractual obligations, the 1st implied, the 2nd express, and the last one must have been intended to supersede the first and to be taken by all parties as a substitute thereto.

> "One written contract complete in itself will be conclusively presumed to supersede another one made prior thereto in relation to the same subject-matter. If agreements be made between the same parties concerning the same matter, and the terms of the later are inconsistent with those of the former so that they cannot subsist together, the later will be construed to discharge the former".
>
> *9 Cyc.,* p. 595.

The terms of the later agreement were inconsistent in every particular except in amount with the terms of the former. The corporations could not have entered action upon the adjustment accounts and succeeded, at least, until they had presented the notes and endeavored to obtain performance of the second contract. We go further, and contend, that they could not have succeeded on the

adjustment accounts and the $8,000 note at all, for the reason that the intention of all parties to the transaction was, that the express promise contained in the second agreement should be taken by the corporations in lieu of the adjustment accounts and the $8,000 note; but in any event, defendant in error must concede that the corporations were bound to be satisfied with the performance of the second.

In *Sheehy v. Mandeville,* 6 Cranch., 3 Law Ed. p. 215, the Supreme Court held, that

> "A promissory note given and received for and in discharge of an open account is a bar to an action upon the open account, *although the note be not paid*". (Italics ours.)

The facts, while in substance differing from the case at bar, possess however, many features similar thereto.

Chief Justice Marshall said (p. 219):

> "That a note without a special contract, would not, in itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it.
>
> "This principle appears to be well settled. The note of one of the parties or of a third person, may, by agreement, be received in payment. The doctrine of nudum pactum does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm

> which might be a sufficient consideration for discharging the firm. Since, then, the plaintiff has not taken issue on the averment *that the note was given and received in discharge of the account,* but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods.
>
> "The special causes of demurrer which are assigned do not, in any manner, affect the case. Whether the promise was made by Mandeville, or not, ceases to be material, *if a note has been received in discharge of that promise,* and the payment of the note need not be averred, since its non-payment cannot revive the extinguished assumpsit". (Italics are ours.)

We submit that in our case the notes were taken for the debt and that this ruling should be applied.

In *Hendrick v. Lindsay,* 93 U. S. 23 Law Ed. page 855, the Court said (p. 857):

> "but negotiable promissory notes are equivalent to the payment of money, if received by the creditor in satisfaction of the judgment, though such satisfaction be not entered on the record".

In *Harris v. Johnston,* 3 Cranch., 2 Law Ed. p. 450, the Court held that a plaintiff could not recover on an action entered on the original contract of goods sold and delivered, while he had taken a note as conditional payment, but had passed away the note; it is plain that the creditor must either surrender the note or account for it.

In *Segrist v. Crabtree,* 131 U. S. 33, Law Ed., p. 125, the Court held that when in an unconditional

sale, a note is given and accepted as absolute payment, the original debt is extinguished and the remedy of the seller is on the note, but if the note is a conditional payment only, it is prima facie evidence of payment so long as the seller holds it, and he cannot rightfully take the goods while he retains the note.

The State Courts held likewise, that a novation may take the place of an implied agreement. This very question came up in the case of the *Illinois Life Insurance Co. v. Bonner,* 97 Pacific Reporter, p. 438.

This was a case where the Illinois Life Insurance Co., who had an open account against Benner, charged to the open account, the amount of a past due note, and Bonner claimed that this new obligation, substituted by the company for the old note, was a novation, and the Court held that it was, although it may not have operated as a payment of the debt. C. J. Johnston, page 439, says:

> "It is argued that the charging of the amount of the note unto an open account did not amount to the payment of the debt, and this may be conceded."

The Judge then cites: *21 A. and E. Cyc. of Law,* pp. 660 and 663, where novation is defined as

> "substitution of an obligation for another, where a creditor accepts from his debtor a new note instead of an old one, or any form of written contract instead of a prior *unwritten* contract or obligation, with the intent to can-

> cel the former and to substitute a new one therefor, a novation by the substitution of a new obligation takes place". (Italics ours.)

The Supreme Court of the United States in *Hawkins v. U. S.*, 96 U. S. 698, 24 Law ed. 607, emphatically lays down the rule to be that:

> "A party cannot be bound by an *implied promise,* when he has made an *express contract* as to the same subject-matter; unless the express contract has been rescinded or abandoned". (Italics ours.)

We submit that the taking of this note superseded the implied contract, this express promise being taken in lieu of the old obligation.

We have more than inferences drawn from the surrounding circumstances to assist us in our conclusion, that on the 21st day of December, 1907, the transaction between the corporations and the defendant, consisting of the giving of the notes, was intended by all parties as an absolute extinguishment of the old obligation on the open account, and a removal of the asset to the place of payment.

We have absolute evidence, the genuineness of which is admitted (Tr. p. 47), as disclosed in the resolution of the Board of Trustees of the corporations who made the agreement, and couched as follows (Tr. p. 11):

"Whereas, on the 21st day of December, 1907, " F. H. Stewart, gave to the said Tanana Railway " Construction Co., *his two promissory notes* in " writing".

We find on the following page (Tr. p. 12):

"And whereas, in accordance with the wishes and " instructions of the stockholders of this Company, " said notes have been cancelled and delivered to " the said Stewart by A. C. Frost, on payment of " $6,000 in full settlement and satisfaction of *said* " *indebtedness*". (The indebtedness of the unpaid demand notes.)

"Said action of A. C. Frost in delivering up and " cancelling *said notes*" etc., "is hereby approved". (Italics ours.)

Then, in the following page (Tr. p. 13), in the letter of A. C. Frost, whose signature is also admitted to be genuine:

"Boland asked me when here this week, regard- " ing *your obligations* to the *Construction Com-* " *pany*". (Italics ours.)

Is it not plain, that if the parties to the contract giving and taking the notes, had considered that the original obligation was not extinguished, they would have made some reference thereto? They mention solely the notes because they took same in lieu of the open account and former note. All the evidence points that way and there is no evidence to the contrary.

This we submit clears up all doubts as to what the parties to the contract intended by taking from the defendant these notes.

In conclusion, we submit that the giving of the two negotiable notes in settlement of another note,

and in the final adjustment of the account; the particular place where the said notes were made payable attended by the removal of the defendant from his position and his change of domicile; the fact that the corporations were only doing construction work in Alaska and were transacting their financial business outside of Alaska; the apparent negotiation of the paper with the Sovereign Bank, had for effect to remove the asset from Alaska to the outside, it being the place of date, payment or demand, and that the new express promise of the defendant was taken by the corporations instead of the former implied contract, and that such was the intention of the parties at the time of entering into their second contract.

That owing to the fact that this asset was removed by the parties outside of the jurisdiction prior to the appointment of the receiver, his order of appointment could not affect the business or property of said corporations in the State of Washington or elsewhere outside of the District of Alaska, and the introduction thereof under the pleadings in this case was error.

II.

"That the Court erred in admitting in evidence " over the objection of defendant, the Minutes of " the Trustees' meetings of said Tanana Railway " Construction Company, held in Seattle, Washing- " ton, to wit: pages 7, 9, 11, 13, 19, 21, 23, 25, 27,

" 33, 35, 37, and 39 of said minute-book" (Tr. pp. 14 to 31).

As we understand this case, there is only one theory under which the minutes of the meetings of the Trustees of the Tanana Railway Construction Company could properly be offered and introduced by plaintiff; that is as having some bearing on the cause of action, i. e., the debt for which he was suing, but it appears from the record (Tr. pp. 52 and 118), that the theory under which they were offered and admitted is to show fraud on the part of the officers and presumably on the part of the defendant.

As to the making, delivery, payment, or surrender, of the note, the said minutes do not even refer to it remotely or otherwise, so it is plain they are not admissible on these grounds.

On the grounds of fraud (Tr. pp. 48 and 52), there is no allegation of fraud in the pleadings; there is no findings of fraud, therefore they should have been clearly rejected as the defendant was not given any opportunity to procure his proof and witnesses to meet it.

The pleadings did not disclose that fraud could have been made an issue, therefore, the defendant below was greatly taken by surprise, nor could he, from a perusal of these exhibits, discover any evidence of fraud directly or inferentially, and for all these reasons they should not have been admitted or considered to support a charge of fraud.

Very v. Levy, 13 Howard, 14 Law Ed., p. 173, was a case where the plaintiff, like the plaintiff below, wanted to avoid a contract set up by the debtor in his answer, by showing fraud therein, and Mr. Justice Curtis said (p. 180):

> "It is asserted by complainant's counsel that the contract was void on account of Levy's fraud; that it was obtained from Davis by false statements and the suppression of material facts by Levy, and, of course, cannot be the basis of any right in a court of equity.
>
> "But this ground is not open to the complainant. No fraud is charged in the bill, and though the complainant may not have anticipated, when the bill was filed, that this contract would be set up in the answer as a defense, yet on the coming in of the answer he might have amended his bill, as he did in another particular, averring that if any such agreement was in fact made, it was void, and charging in what the fraud consisted. Not having done so, he cannot now avail himself of it".

In *Wilson v. Sullivan,* 53 Pacific Reporter, p. 996, the Court says:

> "Fraud, when relied upon as a defense, must be specifically pleaded in an answer, as well as in a complaint; and the facts and circumstances relied upon should be set out, in order that the court may know whether there was such fraud as will be of avail to the pleader, and also that the party charged with fraud may know the nature of the charge, and be prepared to meet it * * * We are of the opinion that the evidence offered was properly excluded".

Citing: *Voorhees v. Fisher*, 9 Utah 303, 34 Pac. 64; *Bliss Code Pleading,* Secs. 211-339; *2 Estes Pl. & Prac.,* 2748; *Boone Code Plead*, 148; *Eaton v. Metz* (Cal.), 40 Pac. 947; *Gleason v. Wilson* (Kan. Sup.), 29 Pac. 698; *Grocery Co. v. Stinson* (Wash.), 43 Pac. 35; *Albertoli v. Branham,* 80 Cal. 631, 22 Pac. 404, and other cases there cited. But aside of the rule of pleadings we may as well investigate the merits: This compromise and settlement could not be a fraud by the Trustees or by the officers of the corporations against the stockholders, since it was done under the wishes and instructions of the stockholders (Tr. p. 12).

It was not a fraud against the creditors at large of the corporations, since it does not appear from the record that any creditor, receiver, stockholder, or any other person outside of Alaska complained about this compromise.

It is true, that in Alaska, a receiver had been appointed at the suit of one creditor, but this particular asset had been removed outside of Alaska ten months before his appointment, and, had he wished to extend his remedy outside of Alaska, he could have done so by proper and ancillary proceedings, which he did not do. It was not, as far as we can see, any fraud per se, and we submit that it is beyond the scope of authority of this receiver, by this mode of proceedings, to inquire collaterally into the matter of the acts of the corporations, outside of the District of Alaska, to the end that he may hold this plaintiff in error responsible therefor.

We submit, that for the reasons hereinbefore set forth, it was error for the Court below to admit in evidence the plaintiff's exhibits.

III.

The Court erred in overruling the defendant's objection to finding of fact No. 8 of the findings of fact, signed and filed in this cause, and in making the same which reads as follows:

" That no part of said indebtedness has been paid " and there is now due thereon from said defendant " to this plaintiff, the sum of $22,796.58."

The Court having found in finding of fact No. 7 (Tr. p. 39):

"* * * and that the said defendant, on the " 31st day of December, 1907, gave to the said Tan- " ana Railway Construction Co. two notes to cover " the said adjustment accounts",

and there being no evidence adduced to disprove the payment of $6,000, it is evident that the theory upon which the Court based its judgment, must have been that the receiver was the only person to whom the obligations to the corporations should be paid whether they were situated in Alaska or outside of Alaska. This was erroneous: there we have a positive finding that the defendant and the corporations entered into a new contract regarding the same matter: these notes are part of the record (Tr. p. 14) and it is not disputed that they were dated, made, and payable outside of Alaska.

Undoubtedly the *lex loci solutionis* would apply thenceforth to any controversy as to the performance of this contract, and for this reason the receiver, to attach, or preserve for his uses any funds in the hands of Stewart payable to these corporations should have gone to the place of performance as he did not have any jurisdiction of the res nor of the person of the defendant (who was not a party to the action wherein the receiver was appointed) (Tr. p. 30) and resorted to ancillary proceedings there, so as to reduce the res to possession; until he had done this, any action brought by him in Alaska would avail nothing.

In *Sands v. Greeley,* 88 Fed. 131, Wallace, Circuit Judge, cites with approval, *Wharton Confl. Laws,* page 390:

> "A receiver appointed in one state for an insolvent corporation, has *no title as such* to property located in another state and not actually in his possession." (Italics are ours.)

In *Miller v. Perkins* (Mo.), 55 S. W., p. 874, the Court said:

> "Jurisdiction of the res is essential to the power to appoint a receiver thereof without which such power cannot exist."

The record does not show in whose possession the notes were at the time of the appointment of the receiver, but it shows that they were *never* reduced to possession by him *at any time.*

And the receiver must possess himself of the property just as anyone else.

Kidder v. Beavers, (Wash.) 74 Pac. 819.

Mr. Justice Wayne, in *Booth v. Clark,* 58 U. S. 322; 15 Law Ed., p. 167, says:

> "It is true that the receiver in this case is appointed under a statute of the State of New York, but that only makes him an officer of the Court for that State. He is a representative of the court and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession. But it is not considered in every case that the right to the possession is transferred by his appointment."

And *Cook on Corporations,* citing *Booth v. Clark,* in support, further says (6th Ed., Vol. 3, p. 3059):

> "As to personal property the appointment does not in itself convey *title to personalty* or choses in action located out of the State." (Italics ours.)

The case of *Venner et al. v. Denver Union Water Co.,* 90 Pac. Reporter, (Col.) pages 623 et seq., is a case where a corporation being organized under the laws of the State of New Jersey, a receiver was appointed by the Court of that State, and in proceedings thereafter had in the State of Colorado against the property of said corporation situate therein, the Court says (page 629):

> "The appointment of a receiver for the American Water Works Company by the Chancery Court of New Jersey, did not abate the actions

theretofore commenced in the District Court of Arapahoe County (Colorado), nor affect them in any manner. (Citing Beach on Receivers and other authorities.)

"Cases pending against a corporation at the time a receiver therefor is appointed, may be likened to bankruptcy proceedings, wherein it has been held that the assignor affecting specific property, has rights no different therein from any other person who may become interested in the subject matter of litigation pendente lite. He may on proper application be made a party; but if he does not apply, such suits may proceed to judgment and he will be bound by the decree." Citing authorities.

The Court further says:

"The proceedings in the Chancery Court of New Jersey did not *dissolve the corporation,* and hence it could be sued the same as before the ex parte interlocutory order * * * or the appointment of the receiver * * *". (Italics ours.)

In the case of *Morrill v. American Reserve Bond Co.,* 151 Federal Reporter, page 306, subdivision 7 of syllabus, it is said:

"A receiver appointed by a federal court of one district, has no power to take possession of property in another district (even in the same state), and his appointment for that purpose (where the Court appointing the receiver, assumes to give such receiver extra territorial powers) does not affect the right or power of the Court in the district where the property is, to take possession of the same through its own receiver."

The Court further says (page 320):

> "The Circuit Court of the Eastern District and its receiver are without power to take possession of, or *administer the assets* of the defendant companies in the Western District of Missouri." (Italics ours.) Citing a line of authorities.

We invite the Court's attention particularly to the case of *Fowler v. Osgood,* 141 Fed. Reporter, pp. 20 et seq., where this subject is treated at length, and where (on page 23) the Court says:

> "This question has recently undergone a thorough re-examination and discussion by the Supreme Court (U. S.) in the Great Western Mining & M'fg. Co. v. Harris et al., 198 U. S., p. 561, Mr. Justice Day, in discussing the rule in Booth v. Clark (mentioned ante), said that it had never been departed from by that court, and was rigidly adhered to. He said: 'The decision rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought, by means of a receiver, to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction, as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the Court, or its approval as to the officer who shall act in the holding and distribution of the property recovered'.

"He adverted to the conflicting decision of the state Courts upon the right of a receiver, upon principles of comity, to sue in a foreign jurisdiction, and said:

"'In this court, since the case of Booth v. Clark, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as to such actions, either in his own name or that of an insolvent corporation such as may be authorized within the jurisdiction wherein he was appointed'."

In *Decker v. Gardner,* 124 N. Y. 336, a case from the New York Court of Appeals, it was held (124 N. Y. 336) that a receiver of a corporation does not supersede the corporation in the exercise of its power except in relation to the possession and management of the property *committed to his charge*—and the appointment *in no wise dissolves the corporation* which may sue and be sued. Citing: *34 Cyc.,* 182; *10 Cyc.,* 1294; *People v. Barnett,* 91 Illinois, 422, and *Kincaid v. Dwinnelle,* 59 N. Y. 548.

As to the discharge of the obligation: The note was made in Montreal, Canada. The *lex loci contractus* applies to its discharge if paid there. By 53 Victoria Cap. 33, Stat. of Canada, 1890, p. 212:

Sec. 60. "When the acceptor of a bill is or becomes the holder of it at or after its maturity in his own right, the bill is discharged."

Sec. 61. "When the holder of a bill, at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged: The renunciation must be in writing unless the bill is delivered up to the acceptor."

By a subsequent section of the said "bill of exchange act", the provisions made for the acceptor of a bill of exchange, are made applicable to the maker of a promissory note. In Canada, the power to legislate on bills, notes, and checks, is in the Dominion —not in the Provinces—British N. A., Act, 30 Victoria Cap. 3.

If it be contended that by reason of Mr. Frost's letter, dated at Chicago, Ill., the note was paid there, the Rev. Stat. of Illinois, p. 1476, Sect. 136, read as follows:

> "A negotiable instrument is discharged * * * * * * * * * * *
>
> "3. By the intentional cancellation thereof by the holder.
>
> "4. When the principal debtor becomes the holder of the instrument, at or after maturity in his own right.
>
> "Sec. 139. The holder may expressly renounce his rights against any party to the instrument before or after its maturity—an absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument."

If the defendant in error would have it that the payment was effected in Seattle, Washington, the principal place of business of the corporations, the laws of 1899 of Washington, regarding the discharge of negotiable papers, are the same as Illinois —said laws of 1899 (Sec. 122, p. 361)—having reenacted the Illinois Statute with the last clause of

the Canadian Statute, that said renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon.

Therefore it was as effectually discharged by the payment of $6,000 and the cancellation and surrender as it would have been by the payment in full. The record also shows the signature of the Trustees, the attest of the secretary, so that the defendant has been discharged by the cancellation and surrender of the notes and by full release *prior to action* being entered in Alaska by the receiver against him.

> "The payment of a bill or note will be presumed from possession after maturity by the maker or acceptor. * * *"
>
> *8 Cyc.,* 246.

> "Where the holder of a bill or note delivers up the obligation with the intent and for the purpose of discharging the same, and there is no fraud alleged or proven, such surrender operates in law as a release and discharge of liability thereon, even though there is *no consideration* to support the same." (Italics ours.)
>
> *7 Cyc. of Law,* p. 1048, citing
>
> *Wilson v. Cromwell,* 1 Cranch. C. C., U. S. 214, and a long list of other authorities.

We submit also, that it was proper for the defendant to show, under his plea of payment, that by his partial payment, made under a special agreement, he satisfied the notes in full.

In *Henderson v. Moore,* 5 Cranch., 3 Law Ed., p. 22, the Court held that:

> "Upon the plea of payment to an action of debt upon a bond conditioned to pay $500, evidence may be received of the payment of a smaller sum with an acknowledgment by the plaintiff that it was in full of all demands; and from such evidence, if uncontradicted, the jury may, and *ought to* infer payment of the whole." (Italics are ours.)

We have now arrived to the point of the right and power of the corporations to compromise this claim. We will discuss it briefly as we think it is unnecessary to do so at great length. We concede that the stockholders could do no more than urge and advise the officers of the corporations. The contractual powers are not with the stockholders but with the said officers, yet the minute book (Tr. p. 12) showing that this compromise was effected by the wishes and instructions of the stockholders, has for effect to remove all intimation that a fraud was practiced upon them.

Says *Cook on Corporations* (Sixth Ed., Volume 3, p. 2512):

> "It is within the power of the directors to compromise a pending lawsuit by or against the corporation, and a stockholder cannot control the director's decision" and he cites:

Donohoe v. Mariposa Co., 66 Cal. 317,

where the Court said:

> "It cannot be contended that the directors of a corporation do not possess authority, acting in

> good faith and in the exercise of their best judgment to settle a pending action, or that the settlement is not binding on their stockholders, even though it may subsequently appear that they failed to secure the *best terms* to which the corporation might have been entitled." (Italics ours.)

And the s. c. in *Pneumatic Gas Co. v. Berry,* 113 U. S., 28 Law Ed. 1003, in refusing to set aside a lease granted by a corporation as a final compromise of claims between the parties held (syllabus):

> "A court of equity will not, at the suit of a corporation, set aside a lease made by it to one of its directors, after it has been executed over seven years before any objection is made to it, and has during this time been repeatedly ratified; and after *a release of all claims* executed by the corporation to the lessee on a *full* and *final settlement* of the matters and claim between the parties, there being *no evidence* that the settlement was obtained *by fraud* or improper conduct of either party, even if the lease was executed in excess of the powers of the corporation." (Italics ours.)

We submit that the officers of this corporation which had *never been dissolved,* were acting strictly within their powers in settling, adjusting and compromising this claim at their principal place of business outside of the jurisdiction of the Court of Alaska.

We contend that upon the pleadings in this case, it was enough for the defendant to produce the notes cancelled and surrendered.

Plaintiff below sues as receiver for a debt for which the defendant failed to account. Defendant admits all the allegations of the complaint, including the fact that there was formerly (prior to December 21, 1907), a debt, but says that he accounted for same and gave his two promissory notes therefor, which he eventually paid (Tr. p. 7); The plaintiff in his reply denies the payment *"of the sum "mentioned and described in the complaint or any "part thereof"* (Tr. p. 9). It must, of necessity, admit the other allegations of the answer, to-wit: The accounting and giving of the notes, their payment, satisfaction and cancellation. It was not the sum of money *"mentioned and described in the plaintiff's complaint"* upon which the plaintiff below should have joined issue: it was the allegation that the notes had been given for that sum or debt and that the notes had been paid, satisfied and cancelled, as he knew or should have known that the notes had been given a long time prior to his appointment and that they were given outside of his jurisdiction, and that they were paid, satisfied and cancelled there, before action.

It is obvious that the only evidence admissible for the plaintiff on these pleadings was such as would identify the debt, to the end that he may prove, that it was not the same debt which the defendant claimed having paid by notes, and thus disprove the payment of that debt. The issue could not have been made any clearer.

But whatever may be the fate, under the ruling of this Court, of the evidence introduced by the plaintiff below, we contend that, even if it be allowed to stand, he has otherwise failed utterly in his proof that said notes had not been paid or that there is now due from defendant to the plaintiff the sum of $22,796.59, or any sum.

IV.

That the Court erred in overruling the defendant's objection to the first conclusion of law signed and filed in this cause and in making the same, which reads as follows:

"1st. That plaintiff is entitled to judgment "against the said defendant for the sum of $22,-"796.59, with interest thereon at the rate of 8 per "cent per annum from December 31st, 1907, besides "the costs and disbursements of this action."

V.

That the Court erred in rendering judgment in favor of plaintiff and against defendant for the sum of $22,796.59, with interest and costs, and erred in rendering judgment against defendant for any sum and on any account whatsoever.

VI.

The Court erred in overruling and denying defendant's motion for a new trial, for all of the reasons hereinbefore given.

VII.

That the Court erred in overruling the defendant's objection to the findings of fact and conclusions of law signed by the court in this cause.

VIII.

That the Court erred in failing to find and adjudge, that upon the facts and the law and the evidence adduced by both sides, the plaintiff's complaint should be dismissed upon its merits and the defendant should recover his costs and disbursements.

We have endeavored to show that there had been a new contract between the corporations and the debtor which had superseded the old one. The defendant, frankly, at all times, admitted a debt and consented to adjust it by notes long before the plaintiff was connected with the corporations, and liquidated his obligations when requested to do so, and so far as the record shows, paid what he was asked, to the holder of the obligations, when so requested, as he was, under the law, bound to do (Tr. p. 12).

The transaction was openly ratified and confirmed by the proper officers (Tr. p. 12).

The judgment obtained by the defendant in error must of necessity, be based upon the theory that all the assets of the corporations were impounded by the fact of the appointment of the receiver, and that

immediately upon his said appointment over their assets in Alaska, they were bound to discontinue transacting business outside of the jurisdiction of the District Court of Alaska, and that it had for effect to stop not only the business of the corporations outside of Alaska, but also the business of the other parties who were the holders of this paper and obligation, either in due course or as pledgees. We have an intimation in this record that the Sovereign Bank people had some interest in these notes. The record is silent, however, as to the time of the negotiation, if any. In the meantime, the holders of the paper outside of the Territory of Alaska, were looking to Stewart for the payment (Tr. pp. 12 and 13) and the receiver could not prevent the holders to enforce payment nor the plaintiff in error to pay the holders.

The plaintiff in error contends that he had proven his plea in the Court below and was entitled to a dismissal, and in conclusion says:

That the Court erred in holding that the obligation had not been paid for the reason that there is *no evidence* of non-payment: on the contrary, there is undisputed uncontroverted evidence of accounting, of his giving two promissory notes for the account, that he paid $6,000, that it was in full satisfaction, that the proper officers ratified and approved the settlement, and that, thereupon, the notes were cancelled and surrendered.

There is not an iota of evidence adduced by the plaintiff controverting any of these statements. There are in this case no pleadings or evidence adduced thereunder raising the question of the powers of these corporations or their trustees in Washington, and therefore no need to discuss it more extensively.

There is no law applicable to the facts in the case to negative the right of the corporations to take the money, or the right and duty of the plaintiff in error to pay it; and for the reasons above mentioned, the court erred in making the finding of fact No. 8, the conclusion of law No. 1, and in entering judgment for $22,796.59, and interest against the defendant, as there is no evidence in support thereof, but the same is contrary to the facts in the case and the law applicable to those facts.

Wherefore plaintiff in error prays: that said judgment may be reversed and that he may recover his costs.

FERNAND de JOURNEL,
Attorney for Plaintiff in Error.

No. 1874

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. H. STEWART (Defendant),
Plaintiff in Error,

vs.

O. G. LABEREE, Receiver of the ALASKA CENTRAL RAILWAY COMPANY (a corporation), and Receiver of the TANANA RAILWAY CONSTRUCTION COMPANY (a corporation), (Plaintiff),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

EDMUND SMITH,
Attorney for Defendant in Error.

Filed this_____day of December, 1910.

FRANK D. MONCKTON, *Clerk.*

By_____*Deputy Clerk.*

Lowman & Hanford Co., Seattle, Wash.

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Answering the brief of the plaintiff in error the following is respectfully submitted by defendant in error for the consideration of the Court:

We cannot accept the statement of the case as set forth in the brief of the learned counsel for plaintiff in error and respectfully submit the following in lieu thereof:

STATEMENT OF CASE.

1. That the Alaska Central Railway Company and the Tanana Construction Company were each corporations organized and existing under and by virtue of the laws of the State of Washington, and were organized for the purpose of doing business in Alaska, and were in fact doing business in the Territory of Alaska.

2. That all of the assets, property, money and credits of the Tanana Railway Construction Company were at all times the assets, property, money and credits of the Alaska Central Railway Company; and the Tanana Railway Construction Company had no assets, property, money and credits, except such as belonged to the Alaska Central Railway Company.

3. That F. H. Stewart, plaintiff in error, was assistant treasurer and treasurer for the corporations above named from February 1st, 1905, until January 1st, 1908, at Seward, Alaska

4. That the debt sued on herein was incurred by the plaintiff in error at Seward, Alaska, while acting as assistant treasurer and treasurer as aforesaid, and said indebtedness was admitted by the plaintiff in error, and was so entered by him on the books of the Tanana Railway Construction Company in two items under the following headings:

"September 10, 1907, F. H. Stewart, adjustment acct. No. 2, amount, $11,188.25."

"October 31, 1907, F. H. Stewart, adjustment acct. No. 1, amount, $11,608.34."

5. That on the 21st day of December, 1907, the plaintiff in error further admitting said indebtedness, signed two non-negotiable promissory notes, payable on demand to the Tanana Railway Construction Company, for said amounts. That said notes were signed at Seward, Alaska, but the word "Montreal" was on the date line of said notes.

6. That on the first day of January, 1908, plaintiff in error quit the employment of the said corporations at Seward, Alaska.

7. That on the 23rd day of October, 1908, the defendant in error was appointed by the District Court for the Territory of Alaska, Third Division, as one of the receivers of all the assets of the said corporations in Alaska, the said corporations each having entered a general appearance, and each being present in open court at the time said order was made appointing said receivers aforesaid. And the said order appointing said receivers among other things provided: "The said receivers be and hereby are appointed receivers of this court of all and singular the property, assets, rights and franchises of the Alaska Central Railway Company described in the complaint herein, situated in the Territory of Alaska * * * * together with all other property in connection therewith, and all money, choses, credits,

bonds, stocks, household interests, contracts and other assets of every kind, and timbers, equipment, rails, ties and all other property, real, personal and mixed, held or possessed by them, or either of them, or hereafter acquired or to be acquired or obtained by them, or either of them. To have and to hold the same as the officers of and under the orders and direction of the court * * * * And the Alaska Central Railway Company and the Tanana Railway Construction Company, and each of them, and the directors, agents and employees of them and each of them, are hereby required and commanded forthwith to turn over and deliver to such receivers or their duly constituted representatives any and all books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, money or other property in his or their hands, or under his or their control, and they are hereby commanded and required to obey and conform to such orders as may be given from time to time by the said receivers, or their duly constituted representatives in conducting the business of the said defendants, and in discharging their duty as receivers, and they, and each of them, and the defendants in this cause, and each of them, are hereby enjoined and restrained from interfering in any way whatever with the possession or management of any part of the business or property over which said receivers are so appointed or from in any way preventing or seeking to prevent the discharge of their duties as such receivers; and said receivers are hereby fully authorized and empowered to fix the com-

pensation of all such agents, employees and counsel as may be required for the proper discharge of the duties of this trust.

Said receivers are hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary in their judgment for the proper protection of the property and trust hereby vested in them."

8. That the plaintiff in error on or about the first day of March, 1909, paid to one, A. C. Frost, who appears to have been acting of his own volition and to aid and assist the plaintiff in error, the sum of six thousand dollars ($6,000.00). The said Frost at the said time was neither officer, trustee, nor agent of either of said corporations. (Said six thousand dollars, $6,000.00, if in fact paid, was for the writing across the face of each of said notes the following words and figures, to-wit: "Cancelled March 1st, 1909.") Said sum of six thousand dollars ($6,000.00) was never received by either of said corporations.

9. That subsequent to March 1st, 1908, and on April 3rd, 1909, the Board of Trustees of the Tanana Railway Construction Company, at a meeting held at Seattle, State of Washington, being the home office of the said corporation, passed a resolution intended to approve, ratify and confirm the prior unauthorized action of said A. C. Frost in the matter of the cancellation of said notes.

ARGUMENT.

All of these facts are admitted in the pleadings, except the question of payment, and the question on this point rests upon the construction, effect, and validity of the acts of Frost and the trustees of said Tanana Railway Construction Company in their attempt to cancel said notes and satisfy said indebtedness.

As all of the facts alleged in the complaint are admitted, and the defense of payment interposed the only matter that we shall attempt to discuss is the question of payment, and in discussing this question we shall refer to the admitted facts for the purpose of illustrating or explaining our views relative to the question in issue.

We earnestly contend from the evidence that the notes were signed in Alaska, if signed on the date they bear. It is an admitted fact in the record that the plaintiff in error was employed by the two corporations as assistant treasurer and treasurer until January 1st, 1908, at Seward, Alaska. We fail to find anything in the record to justify the arbitrary insertion of the word "Canada" after the word "Montreal". It is a fact that can be ascertained from any atlas or post office directory that there are many Montreals in the several states of the Union and there may be a Montreal in Alaska. It seems to us that the evidence absolutely precludes the idea that the notes were signed at Montreal, Canada, on the date they bear, for it is conceded that the plain-

tiff in error was at Seward, Alaska, on the first day of January, 1908, and presumably is still in Alaska. He was personally served there in this action, and we believe the Court will take judicial notice of the fact that Montreal, Canada, is some five thousand (5,000) miles from Seward, Alaska.

Counsel for plaintiff in error seems to be of the opinion that the notes were not signed at Montreal, Canada, on the date they bear. In his opening brief he says: "It is quite certain that the notes never *re-entered* the Territory of Alaska, otherwise they would have been entered on the books of the Company * * * * It is further presumed that they were never intended to be *sent back* to Alaska." (Brief of plaintiff in error, page 21). (Italics ours.)

There is no evidence in the record that the notes were ever in the possession of, or delivered to either of said corporations, or any officer or agent thereof. In this connection the first we hear of the notes is Frost's attempt to cancel them, presumably in Chicago, Illinois. There is nothing in the record from which an inference may be drawn that Frost had any authority to receive them or make any contract in reference thereto, binding upon the corporations, or either of them.

It seems more reasonable to believe that Frost was acting in collusion with the plaintiff in error, his friend (see Tr. p. 13) and to relieve plaintiff in error, or help him out of a rather embarrassing situation. It is quite probable that the six thousand dol-

lars ($6,000.00), instead of being cash, was a forgiveness by Stewart of indebtedness owing by Frost to one or both of these corporations, for Frost was a defendant in the foreclosure suit in which the receivers were appointed. (Tr. p. 30).

The trustees, pursuant to order of court, evidently turned over to the receiver the accounts described in the complaint herein. If the notes had been in existence or known to the trustees at that time, they would have delivered same to the receiver and if notes had been given by Stewart in satisfaction and payment of accounts and accepted as such, Stewart would have cancelled the accounts and entered the notes on the books of the Company.

The notes being non-negotiable were nothing more than a voluntary admission of the indebtedness of the plaintiff in error. The notes were non-negotiable for the reason that they did not contain the words, "or order," or "or bearer." (See notes Tr. p. 11).

From the above considerations we contend that the character of the indebtedness was in no way changed and there is absolutely no evidence that there was any agreement of parties that the notes were accepted in payment of the indebtedness, or were ever in the possession of either of said corporations or any agent thereof.

Another significant fact in regard to the whole question in issue is the admitted fact that these accounts due from the plaintiff in error, were at all

times the property of, and belonged to the Alaska Central Railway Company, and we search the record in vain for any agreement to accept said notes in satisfaction of the accounts, or for Frost and the Tanana Railway Construction Company to sacrifice said asset, or for any ratification of the acceptance of said notes in payment of the accounts, either express or implied, on behalf of the Alaska Central Railway Company, the owners of said accounts and the money due thereon.

The Tanana Railway Construction Company was a mere agent of the Alaska Central Railway Company, the Railway Company being at all times the real party in interest, and the owner of said assets. The Construction Company could not compromise and accept less than due without authority from its principal. The agency of the Construction Company is presumed to be limited to construction work on railways, the purposes for which it was incorporated.

We insist further that the acts of the trustees in attempting to ratify the unauthorized acts of Frost were in violaion of the orders of the Court appointing a receiver, and were a fraud in fact upon the Alaska Central Railway Company, its creditors, and the receiver of the Court; and were in fact a contempt of court. (Alderson on Receivers, p. 242, 243, sec. 199. *Moore v. Mercer Wire Co.,* 15 Atlantic, p. 737; *In re* Swan, 150 U. S. p. 637.) We insist there is a very wide distinction between the effects of an order of court appointing a receiver of corporation

property where the corporations have entered a general appearance and were in court when the order was made, and the effect on creditors in other states not parties to, or bound by such order. In the case at bar the order is binding upon the officers and the corporations everywhere. We concede that a citizen or resident of the state where the corporations were incorporated or domiciled may not be affected by an order of court of foreign jurisdiction appointing a receiver of property of the corporations, and that such resident or citizen may prosecute his cause of action then pending in the courts of the state where the corporation was organized, and may under some circumstances and conditions and in some jurisdictions commence an action, attach property, and prosecute his cause to final judgment in the state where the corporation has its residence under the law, but that is not the case at bar.

The Tanana Railway Construction Company was present in court when the order appointing a receiver was made. Afterwards under their general appearance they consented to decree entered in said receivership suit as set forth in the decree in the said cause. (See stipulation in re record, decree and findings, paragraph 6, Tr. p. 66). We contend under these facts, appearances and admissions, that the order appointing the receivers was binding upon each of the said corporations, their officers and agents everywhere.

Again we contend under the pleadings that there was no evidence proving or tending to prove pay-

ment. Plaintiff in error introduced the resolutions of the trustees of the corporation of April 3rd, 1909, (Tr. p. 10, 11, 12), and the letter of Frost to the plaintiff in error (Tr. p. 13). We insist, however, that these either singly or taken together do not prove payment, nor do they tend to prove it, but at best only tend to prove accord and satisfaction, and that the other resolutions offered in evidence by the defendant in error show conclusively that the acts of the trustees were *ultra vires* and void by reason of the receivership that was binding upon them as aforesaid, and that the said acts were on their face a deliberate and admitted fraud.

"Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside and not within the scope of the powers given by their charters * * * The claim is made on behalf of the appellants that the defendant, in making the orders acted as an agent for an undisclosed principal, and is therefore liable as such. If the defendant had no power to engage in the business as principal, we do not understand what right it had to do so as an agent * * * * *Jemison vs. Citizen's Savings Bank of Jefferson, Texas,* (122 N. Y. 135) 19 A. S. R. 482, 483."

"The plaintiff was a corporation chartered for 'the purpose of manufacturing and selling heating and ventilating apparatus', and for no other purpose, and had no power, by its officers, to become a negotiator or broker of bonds upon commission. The charter of the plaintiff was full and sufficient notice

to the defendant of the limitations of the plaintiff's authority in that respect * * * * *Peck-Williamson Heating and Ventilating Co.* (Supreme Ct. of Okla.) 50 Pac. 236., *vs. Board of Education.*"

"When the paper on its face shows the transaction not to be with the usual course of the business of the bank, it is not binding on the bank, although signed by the president thereof, as such officer. He is the executive agent of the board of directors with-in the ordinary business of the bank, but cannot bind it by a contract outside thereof, without special authority * * * * Although the transaction was with Blumer as president of the bank, yet in all legal aspects, it was with him as an individual * * * * *First National Bank of Allentown v. Hoch* (89 Penn. St. 324), 33 Am. Rep. 770, 771."

"No act done by an officer of an incorporated company in furtherance of a business venture which is outside of the company's corporate powers can be said to be an act which is within the scope of the apparent or customary powers of such officer, and to be binding upon the corporation for that reason * * * * But when the transaction in which a bank is for the time being engaged is known to the person dealing with it to be outside of the legitimate sphere of its operations, no reason is perceived why a person dealing with the cashier under such circumstances should be allowed to indulge in any presumptions as to the cashier's authority. He is advised by the very nature of the transaction that all

acts done and performed in relation thereto are beyond the power of the corporation, and, if he expects to hold the corporation liable on any contract or obligation entered into by the cashier or other officer in the course of the transaction, he should at least see to it that such contract or obligation is approved by the board of directors or other governing body * * * * *Farmers' and Merchants Nat. Bank v. Smith,* 77 Fed. 129."

The minute book of said trustees' meeting further shows that the said A. C. Frost, mentioned in the proceedings herein, was not an officer nor stockholder of the Tanana Railway Construction Company, and shows no evidence of his agency. In fact the attempted proof of ratification precludes the idea of agency. If Frost had been general agent of the corporation as stated by counsel, and there had been no other impediment to his acting, ratification would have been wholly unnecessary. Agency with power to act is wholly inconsistent with the theory of ratification.

"To ratify is to give sanction to something done without authority by one individual on behalf of another." * * * * Ewells Evans on Agency, (1879 Ed.) page 49, marginal.

"There can be no valid ratification unless certain conditions have been fulfilled * * * * among others the power of the person who assumes to ratify." * * * * Id.

"The loss of authority over the subject of agency

by the principal terminates the agency." * * * * Id., page 100, marginal.

"Money intrusted to an agent for a particular purpose is impressed by the law with a trust in favor of the principal until it has been devoted to such purpose; and where it has been wrongfully diverted by the agent, such trust follows the fund into the hands of a third party unless such party receives it for value in good faith, and without notice of the trust." * * * * *Bendinger vs. Central Stock & Grain Exchange of Chicago*, 109 Fed. 926. * * * *

Counsel refers to the letter of Frost to the plaintiff in error, in which he refers to one Boland, and infers from the reference to the Sovereign Bank, in attempting to show their negotiability, that these notes had been negotiated.

We insist in the first place that this letter contained nothing that could affect the merits of this case and the issues involved herein. Frost had no authority to bind the owner of the assets, and his letter is in the nature of a self-serving declaration. If the notes had been negotiated at the Sovereign Bank as suggested by counsel, it conclusively establishes the fraud and fraudulent acts of Frost and the trustees. It further shows, whoever Boland is or whatever interest he may have had in these notes, that he, either for himself or for parties he may have represented, questioned the right of Frost to act in this matter, or at least questioned the propriety of Frost's acts. We think from the stipulation as to the findings and decree (Tr. p. 66) that Boland may

have represented the bondholders who were of course interested in the assets.

Another significant fact is that the trustees of the Tanana Railway Construction Company were mere "dummy" trustees not personally interested in the corporation. And when we consider in this connection that plaintiff in error was indebted to the Alaska Central Railway Company in the additional sum of $8,000.00—"used as I. O. U. memo to balance cash account at Seward"—(See Tr., note p. 14) and to the Tanana Railway Construction Company for the two accounts, one for $11,188.25, and one for $11,608.34, or a total of $30,796.59, all of which was at all times the property of the Alaska Central Railway Company; that plaintiff in error signs note for the amount of $11,188.25 but inserts satisfaction of $8,000.00 due the Alaska Central Railway Company, and signs a second note for $11,608.34, thereby discounting the indebtedness $8,000.00; that plaintiff in error then meets Frost who generously cancels said notes for $6,000.00, which he, Frost, "has expended for and on behalf of said Tanana Railway Construction Company"; that the "dummy" trustees attempt to ratify and confirm this transaction with no statement as to how this money was expended, (Tr. p. 11 and 12) and counsel for plaintiff in error insists that this is a payment of the sum of $30,796.59. What benefit, we ask, did the Alaska Central Railway receive from this high financing?

We therefore contend that the indebtedness for

which this action was prosecuted has not been paid and that notes were not accepted in satisfaction of the said accounts, for the following reasons:

1st. The indebtedness or claim was at all times the property of the Alaska Central Railway Company.

2nd. No authority is shown to authorize either Frost, Stewart, or the trustees of the Tanana Railway Construction Company to forgive or compromise said indebtedness, or to dissipate the assets of the Alaska Central Railway Company.

3rd. The acts of Frost, Stewart, and the "dummy" trustees of the Tanana Railway Construction Company were fraudulent *per se.*

4th. The attempted cancellation of the notes and the attempt to cancel the indebtedness were in violation of the order of the court and void, the property being in *custodia legis* and trustees enjoined from interfering therewith.

"The effect of the appointment of a receiver for a corporation is to vest in him, as an officer of the court, a qualified title to all of the property of the corporation within the court's jurisdiction and the right of possession for purposes of administration and for the benefit of those ultimately shown to be entitled to it." * * * * *Lewis et al vs. American Naval Stores Co.,* 119 Fed., page 391. * * * *

5th. The cause of action arose in Alaska and was payable there, and at all times was an Alaska contract.

6th. That no evidence was offered by plaintiff in error which proved or tended to prove payment as understood and defined by law.

7th. There is no evidence in the record that the Alaska Central Railway Company or the Tanana Railway Construction Company ever accepted said notes in satisfaction of said accounts.

8th. That there is no evidence that said notes were ever in the possession of either of said companies, their officers or authorized agents, or that the Alaska Central Railway Company or the Tanana Railway Construction Company ever knew of their existence prior to April 3rd, 1909.

9th. That no consideration was ever received by the owner thereof, the Alaska Central Railway Company, for said indebtedness or any part thereof.

10th. That no authority is shown to have been given to Frost or to the Tanana Railway Construction Company to settle said indebtedness.

11th. That the Tanana Railway Construction Company personally appeared at the hearing on application to appoint a receiver and was present in court when order was made, and was bound both by appointment of receivers and the injunctional order therein contained.

12th. That Frost was a party to the action in which the receiver was appointed, and consented to the findings and decree,—"That all the assets of the Tanana Railway Construction Company were at all times the property of the Alaska Central Railway

Company and raised by the sale of Alaska Central bonds." (Tr. p. 66, sec. 6).

We will now pass to the questions of law raised by the counsel for plaintiff in error, and in the order in which they appear in the brief of plaintiff in error. (P. 5-6.)

We contend that the first proposition is fully answered by the facts. The notes were not accepted in payment of the debts or accounts. They were never in the possession of the owner of the assets, viz: Alaska Central Railway Company. No authority is shown whereby Frost or the Tanana Railway Construction Company could accept said notes in satisfaction of the accounts, and there is no evidence that either of them did accept or attempt to accept the notes in satisfaction of the accounts. There is no evidence that the notes were not made in Alaska, and the presumption is that they were made in Alaska.

"The entire doctrine of substitution and the legal effect thereof depend upon the agreement between the parties and is governed by the general law of contracts" * * * * Ogden on Negotiable Instruments, Section 187, Page 173. * * * *

"In the absence of an agreement either express or implied, a negotiable instrument is not an absolute and unconditional payment of the debt and a discharge of the original obligation. Then it has been held that the debtor's own note given for a precedent or contemporary debt is conditional payment."

* * * * Ogden on Negotiable Instruments, Section 17, Page 12. * * * *

"An agent authorized to receive payment is not impliedly authorized to receive anything but money. He cannot bind his principal by accepting a promissory note, check, draft, or merchandise. He cannot compromise a claim and accept less than the amount due, or substitute himself as debtor. Nor can he receive payment before it is due." * * * * Huffcut on Agency, Pages 145, 146. * * * *

"Debtor does not satisfy his debt by giving his own notes, payable at a future day." * * * * *Winsted Bank vs. Webb,* 100 Am. Dec., page 435. * * * *

"A promissory note, given for goods, is no bar to an action for the price of the goods founded on the sale. In the present case it is not pleaded as an accord and satisfaction, and it is in that form only that defendant can avail himself of it. It is not satisfaction unless it be paid." * * * * *Sheehy vs Mandeville,* 6 Cranch, page 258. * * * *

Nightingale vs. Chaffee, 23 Am. Rep. 531.

"All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and have the same effect and shall be negotiable in like manner as inland bills of exchange, according to the custom of merchants

* * * *. Acts and Treaties of Congress relating to Alaska, Appendix B, section 190. * * * *

The foregoing is a statutory enactment of a general rule of law.

SECOND PROPOSITION.

Passing to the second proposition of counsel, viz: "Could the question of fraud be raised and evidence be adduced thereupon by the defendant in error without any pleadings on his part?"

We think counsel is in error in the application of the rule for which he contends. We concede that where a party attempts to recover money on the ground of fraud or fraudulent acts of the defendant, or where defendants seeks to avoid an obligation on the ground that same was procured by fraud, the fraudulent acts must be alleged, but that rule has no application to the case at bar.

In this case the defendant in error sued for money had and received, or on an account stated; the plaintiff in error admitted all the facts but pleaded payment, and defendant in error replied by a general denial. Plaintiff in error made no attempt to prove payment but attempted to prove accord and satisfaction. The term payment implies the payment of the amount claimed in full in cash or money.

In attempting to prove payment plaintiff in error introduced in evidence over the objection of the defendant in error, the minutes of the trustees meeting held April 3rd, 1909, which, as claimed by de-

fendant in error, shows on its face that the acts of the trustees were fraudulent and void, for all or any of the following reasons:

1st. That the money due from plaintiff in error was not the money or property of the Tanana Railway Construction Company, but was the money and property of the Alaska Central Railway Company.

(See complaint and admissions in answer, transcript pages 1 to 7 inclusive; also stipulation as to findings of fact and conclusions of law and decree, in the case of *Trust and Guarantee Company, Ltd. vs. Alaska Central Railway Company, Tanana Railway Construction Company et al.* See transcript page 66.)

2nd. That it was a fraud in fact upon the Alaska Central Railway Company and its creditors and this defendant in error as their representative, the receiver, for the trustees to attempt to acknowledge satisfaction of $22,766.50 with interest for about fifteen months at the rate of 8% per annum without receiving a cent for party entitled thereto, viz: Alaska Central Railway Company.

3d. Said act was in violation of the order of court appointing the defendant in error receiver of all the assets of the Alaska Central Railway Company and the Tanana Railway Construction Company in Alaska, and in violation of the injunctional order therein contained, for the reason that all the parties, including the trustees of the said Tanana Railway Construction Company, were before the

court either in person or by counsel by general appearance, when the order was made. (See tr. pp. 30 to 36).

4th. That the resolution did not prove payment nor tend to prove it, but did prove that the trustees had attempted, in violation of the said order of court, to dissipate about $23,000.00 worth of the assets of the Alaska Central Railway Company, said assets having accrued in Alaska. All these facts appear on the face of the resolution offered.

While the defendant in error is not seeking to recover from the plaintiff in error a sum of money on account of the fraudulent acts of the plaintiff in error, or of the trustees of the Tanana Railway Construction Company, we are insisting that the evidence offered by the plaintiff in error is incompetent by reason of the fraudulent acts therein set forth.

In other words there are two elements essential for the plaintiff in error to establish, viz: 1st Payment. 2nd That the party to whom payment was made had the authority to receive and receipt for same. The evidence offered fails to establish either of these facts, and if this evidence tends to prove these facts, the defendant in error could introduce any evidence tending to break down, contradict, or in any way qualify the evidence offered. In other words under the issues in this case if the plaintiff in error had offered a receipt for the amount due, the defendant in error could have met this evidence by showing that the receipt was a forgery, or that

the party giving the receipt was not authorized to receive and receipt for the same. In fact the last was just what was done.

We concede that if plaintiff in error had stated the facts constituting his defense as required by statute, viz: had explained how the indebtedness was satisfied, (Sec. 63, Chap. 8, Code of Proc. Alaska), in that case it would have been incumbent on defendant in error to have replied thereto by alleging fraud if he had been advised of the facts relied on by plaintiff in error.

Under general denial defendant may prove that contract sued on is void under the statute of frauds * * * * *Fontain vs. Bush*, 12 Am. St. Rep. 722. * * * * *Feeney vs. Howard*, 12 Am St. Rep., 162. * * * *

"Defense that contract is illegal or void as being against public policy may be shown under general denial when it is incumbent on the party relying on it to prove its validity." * * *

School District vs. Stocking, 37 L. R. A. 709;
* * *
Sheldon vs. Pruesner, 22 L. R. A. 347; * * *
Weaver vs. Sewer Co., 70 Pac. 953; * * *
Benton vs. Yuran, 55 Pac. 676; * * *
DeLissa vs. Coal Co., 52 Pac. 886 * * *
Code of Alaska, title reply, p 158, sec 67; * * *

"Under a general denial any evidence is competent which tends to dispose of plaintiff's cause of action, or defendant's counterclaim or affirmative

defense, or which tends to meet, contradict or break down the evidence offered in support thereof." * * * *Chaney vs. Ural,* 117 Am. St. Rep. 391; * * * *Bridges vs. Paige,* 13 Cal. 640; * * * *Peuter vs. Straight,* 25 Pac. 469; * * *

Davis vs. McCrocklin, 8 Pac. 196; * * *
Landis vs. Morrisy, 10 Pac. 258; * * *
Same in 10 Pac. 261; * * *
Stockton vs. Knock, 15 Pac. 51; * * *
Enc. Ev. Vol. 9, p. 732; * * *
Wheeler vs. Thomas, 35 Atl. 449; * * *
Gornier vs. Renner, 51 Ind. 372; * * *
Lowe vs. Warden, 19 Pac. 235; * * *
Lillianthall vs. Hathing, 15 Pac. 630; * * *
Boone on Code Pleading, Vol. 1, Sec. 65; * * *
Estee's Pleadings, Vol. 2, p. 1376, sec. 143 * * *

"Proof under general denial in reply. The plaintiff may introduce any evidence inconsistent with the facts alleged in the answer, or which tends to meet, contradict or break down the defense, and is not confined to negative proof in the denial thereof." * * * * Enc. Pl. Vol. 18, p. 717 and notes * * * *

THIRD PROPOSITION.

"Had the stockholders and officers of the corporations at their principal place of business, to-wit: Seattle, the right to compromise and settle the said claim of the corporation against this debtor?"

In disposing of this proposition we think it important at this time to enquire: Does proof of set-

tlement by compromise or accord and satisfaction prove payment? We sumbit that it does not and submit the following authorities in support of our position:

" 'Payment' means the full satisfaction paid by money, and not an exchange or compromise, or an accord and satisfaction, and it is only where the words used in connection with it plainly manifest a different intention that such legal import can be rejected." * * * * *Manice vs. Hudson River R. Co.*, 10 N. Y. Super. Ct. (3 Duer) 426, 441. * * * *

"The term 'payment' in its legal import means the satisfaction of a debt by money, not by exchange or compromise, or an accord and satisfaction." * * * * *City Savings Bank vs. Stevens*, 15 N. Y. Supp. 139, 59 N. Y. Super. Ct. (27 Jones & S.) 549. * * * *Maurice vs. Hudson River R. Co., Supra.* * * * *

"Thus the term 'payment' in its legal import means the full satisfaction of a debt by money, not by an exchange or compromise, or an accord and satisfaction, and it is only where the words used in connection with it plainly manifest a different intention that the legal import of the term can be rejected; * * * * *Chaflin vs. Continental Jersey Works*, 85 Ga. 27, 43, * * * * 11 S. E. 721, 723, (citing *Manice vs. Hudson River R. Co. Supra.*) * * * *

"A payment ordinarily implies the delivery and receipt of money by the agreement of the parties to the transaction in extinguishment of an existing debt." * * * * *Coughtry vs. Levine*, (N. Y.) 4 Daly, 335, 337; * * * *

"In the absence of an agreement to that effect, the acceptance of a debtor's note is not payment of a claim;" * * * * *Bank of the United States vs. Daniel*, 37 U. S. (12 Pet) 32, 33; 9 L. Ed. 989; * * * * *Lyman vs. United States Bank*, 53 U. S. (12 How.) 225, 245; * * * * *Weed vs. Snow*, (U. S.) 29 Fed. Cas. 372, 573; * * * * *in re Ouimette* (U. S.) 18 Fed. Cas. 913, 916; * * * * *Lawrence vs. United States* (U. S.) 71 Fed. 228, 233; * * * * *Mooring vs. Mobile Marine Dock & Mut. Ins. Co.*, 27 Ala. 254, 258. * * * * *Marshall vs. Marshall's Ex'rs*, 42 Ala. 149, 151; * * * * *Keel vs. Larkin*, 72 Ala. 493; * * * *

Recurring to the abstract question as to the right of the trustees to make this alleged settlement we insist that they did not have such right, for the following reasons:

1st. The contract sued on is admitted to have been an Alaska contract made in Alaska, and no evidence appeared in the record to show it was ever removed from the *loci contractus*.

2nd. It was under the jurisdiction of and in the possession of the receiver and therefore was in *custodia legis*.

3rd. It was in violation of the order of court in appointing the receivers and the injunctional order therein contained, which orders were binding upon said trustees everywhere for the reason that a general appearance had been made by the said Tanana Railway Construction Company, who was present in open court when the order was made and took no appeal therefrom.

"The power seems ample to order the application to satisfaction of the judgment of all the debtor's property, (not exempt) of whatever nature, or wherever situated, and to make any orders proper and necessary to enforce such application." * * * *Towne vs. Goldberg,* 28 N. W. 254; * * * *

See also Alderson on Receivers, page 260, 278; * * * * High on Injunctions, sec. ed. sections 1197, and 1416 to 14448 inclusive * * * * Id. Sec. 1460 * * * *

The distinction between suits brought against foreign corporations in foreign states and the voluntary acts of a corporation when it has submitted to the jurisdiction of the court where receivership is pending, especially when the order appointing directs it to turn over its assets and enjoins it from further interfering with same, is recognized in *Linville vs. Hadden*, 43 L. R. A. 222.

See High on injunction as to what notice is necessary to bind parties, sections 1421 to 1424.

That the appointment of the receiver in the above mentioned suit absolutely terminated all rights and authority of said trustees over the assets of either the Alaska Central Railway Company, or the Tanana Railway Construction Company in Alaska. In support thereof see the following authorities: Alderson on Receivers, sections 354, 355, 356, 357, 358, 362, 363; * * * * Purdy's Beach on Private Corporations, last ed. sec. 1224; * * * * Cook on Corporations, last ed. sections 869, 870, 972, 643 to 663, 738, 746.

"It is a universal rule which admits of no ex-

ception that if the court has jurisdiction of the subject matter, a general appearance gives jurisdiction over the person." * * * * Enc. Pl. & Pr. Vol. 2, p. 639 * * * * and authorities cited from most of the states. * * * *

"The principal that a general appearance confers personal jurisdiction is of great importance when a non-resident is sued. In a personal action brought against a citizen of another state the court does not acquire jurisdiction over him by virtue of notice served on him in such other state. While process cannot extend beyond the limits of the state, *yet a non-resident becomes subject to the jurisdiction of the court by a general appearance.*" (Italics ours) * * * * Enc. Pl. & Pr. Vol. 2, P. 640, 641, 642 * * * * and authorities cited.

"*And a voluntary and general appearance by, a foreign corporation gives jurisdiction over it*" (Italics ours). Id. citing the following:

New York—*Carpentier vs. Minturn,* 65 Barb. (N. Y.) 293; *Murray vs. Vanderbilt,* 39 Babr. (N. Y.) 140; *McCormick vs. Pennsylvania Cent. R. Co.,* 49 N. Y. 303; * * * * *Cook vs. Champlain Transp. Co.,* 1 Den. (N. Y.) 91; * * * * *Brooks vs. New York, etc., R. Co.,* 35 Hun (N. Y.) 47; * * * * *De Bemer vs Drew,* 39 How. Pr. (N. Y. Supreme Ct.) 446; * * * *

Minnesota—*Anderson vs. Southern Minnesota R. Co.,* 21 Minn. 30; * * * *

Wisconsin—*Congar vs. Galena, etc., R. Co.,* 17 Wis. 477; * * * *

Indiana—*Louisville, etc., R. Co. vs. Stover*, 57 Ind. 559; * * * * *Louisville, etc., R. Co. vs. Nicholson*, 60 Ind. 158; * * * *

Massachusetts—*Pierce vs. Equitable Life Assur. Soc.*, 145 Mass. 56; * * * *

Maine—*Buckfield Branch R. Co. vs. Benson*, 43 Me. 374; * * * *

Kansas—*North Missouri R. Co. vs. Akers*, 4 Kan. 453; * * * *

Maryland—*Fairfax Forest Min., etc., Co. vs. Chambers*, 75 Md. 604; * * * *

"When a foreign corporation has appeared to the action, it is as much within, and subject to, the jurisdiction of the court as if it were a domestic corporation." * * * * *Dart vs. Bridgeport Farmers' Bank*, 27 Barb. (N. Y.) 337; * * * *

It is settled law that: "it is not necessary that a party be served with an injunction order to render him amenable to its provisions, if it appears that he had reasonable notice of it" * * * * *Ex parte Richards*, 117 Fed. 658. * * * *

Where in injunctions against a corporation the officers of same in another state wilfully disobey the same, it subjects the corporation to proceedings for and punishment for contempt * * * * U. S. *Ex rel Express Co. vs. Memphis & L. R. R. R. Co.*, 6 Fed. 237. * * * *

"It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a

suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues the order, and an unwarrantable interference with and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order" * * * * *In re Reese,* 107 Fed. 947; * * * *

"A person may be in contempt either by violating an express restraining order issued to him in a suit to which he was a party by name or privity, or by adequate representation, or, if he be not such a party to the suit, he may be in contempt either by aiding or abetting a party to the suit in disobeying or resisting the injunction, or by independently or intentionally interfering with and preventing the execution of the decree of the court, thereby thwarting the administration of justice, rendering nubatory its action, and contemning the authority of the court." * * * * *Chisholm vs. Caines,* 121 Fed. 401. * * * *

"Where a Federal court has issued an injunction directed against the defendants in a suit, and which has been served upon them, such court has jurisdiction to punish for contempt any person who, with actual knowledge of the injunction and of its scope and effect, combines and confederates with defendants who were enjoined, for the purpose of violating

and resisting it, and who, in pursuance of such conspiracy, aids and assists in the commission of acts which were enjoined. This jurisdiction exists by reason of the conspiracy to defeat the process of the court, and although such person is a stranger to the suit, and, by reason of his citizenship, could not have been made a defendant therein." * * ** *Conkey Co. vs. Russell,* (C. C.) III Fed. 417. * * * *

Acts done without the jurisdiction of the court and in another state when parties made general appearance may be punished as contempt when such acts are in terms prohibited by the injunction order.

Enc. Pl. & Pr. Vol. 10, p. 1098.

McCauley vs. White Sewing Machine Co., 9 Fed. 698.

U. S. ex rel. Express C. vs. Memphis & L. R. R. R. Co., 6 Fed 237.

In fact if party can appear in court and contest issue of injunction and when writ is issued go beyond the limits of the state and deliberately violate it, and the party receiving the benefits of such illegal acts can come back into the jurisdiction of the court issuing the order and prove and rely upon the illegal and contemptous acts as a defense to the payment of his plain obligations, and the court be powerless to protect the injured party, then injunctions are of little value and courts completely lose their independence and dignity, and instead of requiring the strictest obedience to the high prerogative writ, the injunctional orders of courts become a mere play-

thing with such men as Stewart, Frost, and the "dummy" trustees of the Tanana Railway Construction Company.

To illustrate the principle involved as to the presumption of agency in this case: The Alaska Central Railway Company was engaged in constructing a line of railroad in Alaska, and the presumption is that the agency of the Tanana Railway Construction Company related only to that work, and from such agency no presumption to collect or discount the choses or accounts receivable of the principal is to be inferred from such agency. As to the authorities on the extent of agents' authority see 131 Am. St. Rep.; note pages 306 to 338.

"Possession of property by an agent is not evidence of authority to sell; nor is evidence of the offering the property for sale by the agent sufficient to show authority." * * * * Enc. Vol. 10, p. 32 * * * *

"It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates or neglects them, and loss results to his principal as a natural and ordinary consequence, it is his duty to make such loss good. * * A person dealing with an agent of limited power and who knows of the nature and extent of the limitation, is bound thereby. * * * * *David Bradley & Co. vs. Basta et al*, (Neb.) 98 N. W. 697. * * * *

"Upon the same doctrine one who deals with an agent knowing that the latter is not in that transaction showing good faith toward his principal, deals

at his peril as a party to the agents bad faith or fraud." * * * * Huffcut on Agency (second edition) p. 111, Sec. 90. * * * * *Hegenmyer vs. Marks* (Supra) * * * *

"One taking commercial paper upon the indorsement of the payee's agent has the burden of proving the authority to make such indorsement. * * * * A person dealing with an agent takes the risk as to the extent of his authority, and is bound to enquire into it. * * * * Authority to indorse commercial paper cannot be inferred from the fact that the agent is a traveling salesman, collector, or is even treasurer, president, general manager, or general agent of his principal. A general agent must have special authority to accept or indorse commercial paper." * * * * *Jackson Paper Manufacturing Co. vs. Commercial Nat. Bank,* 59 L. R. A., 657, 659. * * * *

"The relation existing between a principal and his agent is a fiduciary one, and consequently the most absolute good faith is essential. The principal relies upon the fidelity and integrity of the agent, and it is the duty of the agent, in return, to be loyal to the trust imposed in him, and to execute it with the single purpose of advancing his principal's interests." * * * Huffcutt on Agency (sec. ed.) p. 110, Sec. 90. * * * * *Michoud vs. Girod,* 4 How. (U. S.) 503. * * * * *Durand vs. Preston,* 128 N. W. (advance sheets No. 1) p. 129. * * * * Clark & Skyles, Agency, Sec. 404; 31 Cyc. 1430. * * * *

"An agent in charge of a branch lumber yard was held to have no authority to indorse a note for his

principal and ratification thereof could be made only with knowledge of the fact." * * * * *Deitz vs. City Nat. Bank of Hastings*, 27 L. R. A. p. 402 note.

"Upon this contract of agency, we are of the opinion that when the agent learned of a fact affecting the value of the property, and of which fact he knew the principal was ignorant when she fixed the price, and if the agent had reason to believe that had she known the fact she would have fixed a higher price, then good faith towards his principal required him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact that he had learned, was, of course, a fraud upon her." * * * * *Hegenmyer vs. Marks* (Supra). * * * *

"A ratification of the contract of an agent by a principal is not binding on the principal where it is not made with a full knowledge of all the facts connected with the transaction." * * * * *Quale vs. Hazel,* (So. Dak.) 104 N. W. 216. * * * *

"The general rule is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding upon the principal, must have been made with a full knowledge of all the material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have

been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent." *Combs vs. Scott,* 12 Allen 493. * * * * Story Agency (9th Ed.) p. 282, note I p. 287. * * * *

"The burden rests with the person claiming the ratification of an unauthorized conveyance, contract or act, to prove that the principal or master had knowledge of all the material facts at the time of the alleged ratification, and also to prove the promise, conduct, or acts claimed to establish ratification. The ratification of a contract or conveyance rendered voidable by fraud must be proved by the person claiming ratification by a preponderance of the evidence." * * * * Enc. Ev. Vol. 10, pp. 612, 613. * * * *

The first and highest duty of a trustee or agent or any one holding a fiduciary position, is fidelity to his principal, and any collusion by and between an agent and those with whom he deals, is fraudulent *per se* and void and not binding upon the principal. This is so elementary that citations of authorities would be superfluous.

Apply this same rule of law to the trustees of the Tanana Railway Construction Company in collusively attempting to dissipate $30,796.59 of the assets of its principal, the Alaska Central Railway Company, without a cent of benefit or consideration to the principal.

"Highest degree of good faith required of agent or trustee." * * * * *Trust Co. vs. Menage,* 76 N. W. 195. * * * *

As to fraudulent acts of trustees and directors of corporations, see Cook on Corporations (6th Ed.) Sections 643 to 664 inclusive. * * * * Purdy's Beach on Corporations, Sections 773, 780, 973.

"A trustee or agent cannot release claim or demand without consideration, and attempt to do so is a fraud upon the beneficiary or *cestui que* trust." * * * *Hale et al vs. Dresser*, 76 N. W. 31. * * * *Herring vs. Hottentorf*, 74 N. C. 588. * * * * *Melvin vs. Larnor Ins. Co.* 80 Ill. 446. * * * *

.. "The form or intrinsic characteristics of the transaction or instrument itself, and all the circumstances, whether preceding, accompanying, or following it, are relevant and admissable to prove or disprove fraud therein. The transaction may, of itself and by itself, furnish the most satisfactory proof of fraud, so conclusively as to outweigh the answer of the party charged and even the evidence of witnesses. * * * * Enc. Ev. Vol. 6, p. 24, 25. * * * *

"The result accomplished by the fact charged as fraudulent may be relevant as clearly indicating the purpose or intent with which the act was done, and a comparison between the actual result of an alleged fraudulent act and what would have been the result of a similar act if fair and equitable, is competent." * * * * Enc. Ev. Vol. 6, p. 25.

"The discrepancy between the actual result of an act claimed to have been fraudulent and what the result would have been had no fraud been practiced, may be so gross as to conclusively establish fraud in

the act. * * * * The shortage was 1,502 bushels, exactly what it had been when the grain was unloaded from the vessel. Of course this fact clearly demonstrated that a substantial mistake was made in weighing the grain which actually went on board at West Superior, and this was sufficient to support a conclusion that the error was either fraudulent, or was so gross as to imply bad faith, or a failure on the part of the umpire to exercise an honest judgment when weighing out the shipment. In either case his decision could be impeached. A deficiency of 1,502 bushels in a cargo of 81,000 (almost 2 per cent. of the whole) cannot be accounted for as an honest mistake. It is altogether too substantial." * * * * *Cleveland Iron-Min. Co., vs. Eastern Railway Co. of Minnesota,* 78 N. W. P. 84, 85. * * * * Enc. Ev. Vol. 6, note p. 25. * * * *

This is not a case of an innocent party dealing in good faith and for value with trustees acting in an illegal manner or in violation of the injunction order. The plaintiff in error was indebted to the Alaska Central Railway Company in the sum of $8,000.00; in the sum of $11,608.34, and in the sum of $11,188.25, making a total of $30,796.59. This indebtedness he claims to have paid with only $6,000.00, which sum added to the judgment of $22,796.59 is $2,000.00 less than the amount actually due.

We insist that the $8,000.00 due the Alaska Central Railway Company was in addition to the two adjustment accounts sued on in this action. Plaintiff in error was the assistant treasurer of the Alaska

Central Railway Company and was treasurer of the Tanana Railway Construction Company. The $8,000.00, from his own admission (Tr. p. 14), was to balance cash account of the Alaska Central Railway Company. The two adjustment accounts sued on herein, viz., $11,608.34 and $11,188.25, were used to balance his cash account of the Tanana Railway Construction Company. This must have been the true status of his account as assistant treasurer and treasurer for otherwise his books would not have been in balance, and the recitation in the note that it included $8,000.00 due the Alaska Central Railway Company, being an arbitrary act of plaintiff in error, would not have been necessary.

If plaintiff in error had been an innocent party dealing with agent as principal (with principal undisclosed) and had paid a fair consideration for his indebtedness, his position would at least excite sympathy, and courts might possibly be inclined to show him leniency, but he was a trusted official, in possession of all the facts relative to the indebtedness, the same being due from himself, and therefore is entitled to no relief in the courts. The record in this case plainly shows that under no possible construction or reconcilment of the evidence and circumstances is he entitled to the relief for which he contends. If it could be possible that the indebtedness was only $22,796.59, the sum of $6,000.00 could not be considered as a payment of the same.

We therefore insist that the officers of the Tanana Railway Construction Company, at their principal

place of business, to-wit: Seattle, had no right to compromise and settle the said claim of the Alaska Central Railway Company against this debtor; and as to the fourth proposition we think it is fully covered by the law and the facts pertaining to the first, second and third propositions.

We use the word "dummy" trustees advisedly, yet not with a desire to be personal, but the minutes of the trustees' meetings show that but one share of stock was given to each of said trustees to qualify them for the position. The minutes further show that the only official act done by these trustees was the attempted cancellation of the indebtedness of the plaintiff in error to the Alaska Central Railway Company. (Tr. pp. 14 to 29 inc.).

TO RECAPITULATE.

The contract sued on was an Alaska contract.

There is no proof of payment.

Acts of Frost and the trustees of the Tanana Railway Construction Company were fraudulent, and the plaintiff in error was a party to the fraud, and the Alaska Central Railway Company is not bound thereby.

Accord and satisfaction is not payment.

Stewart as treasurer and assistant treasurer knew the account was the property of the Alaska Central Railway Company and admits it in his answer.

The chose or account was in custody of the receiver and officer of the court.

There was no consideration for act of trustees in attempting to ratify unauthorized acts of Frost.

The acts of the trustees were in violation of injunction order of the court appointing a receiver and were therefore void.

We therefore respectfully submit that the judgment of the District Court, Third Division of the Territory of Alaska, should be in all things affirmed.

Respectfully submitted,

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Of Counsel.